(17)

No. 94-558-ATX
Status: GRANTED

Title: United States, Appellant
v.
Ray Hays, et al.

Docketed:
September 26, 1994

Court: United States District Court for the
Western District of Louisiana

Vide:
94-627

Counsel for appellant: Solicitor General, Ieyoub,Richard P.

Counsel for appellee: Starr,Kenneth W., Ieyoub Jr.,Richard P., Hurd,Paul Loy, Warren,Edward W.

Notice of appeal filed 7-26-94. Ptn due 9-24-94, Saturday, rcd 9-26-94.

Entry	Date	Note	Proceedings and Orders
39	Mar 15 1994		Brief amici curiae of Ruth O. Shaw, et al. filed. VIDED.
1	Jul 29 1994	C	Application (A94-75) for a stay pending appeal, submitted to Justice Scalia.
2	Jul 29 1994		Application (A94-75) referred to the Court by Justice Scalia.
3	Aug 3 1994		Response to application (A94-75) filed by Ray Hays, et al..
4	Aug 3 1994		(A94-75) Reply to opposition filed by Solicitor General.
5	Aug 11 1994		(A94-75) The applications for stay presented to Justice Scalia and by him referred to the Court are GRANTED and it is ordered that the judgment of the United States District Court for the Western District of Louisiana, Civil Action No. CV 92-1522S, filed July 25, 1994, is stayed pending the timely filing of statements as to jurisdiction in this Court. Should such statements be so timely filed, this order shall remain in effect penidng this Court's action on the appeals. If the judgment should be affirmed, or the appeals dismissed, this stay shall expire automatically. In the event jurisdiction is noted, or postponed, this order shall remain in effect pending the sending down of the judgment of this Court. Justice Scalia would deny the applications.
6	Sep 26 1994	G	Statement as to jurisdiction filed.
7	Oct 28 1994		Motion of appellees Ray Hays, et al. to affirm filed. VIDED.
8	Nov 8 1994		DISTRIBUTED. November 23, 1994 (Page 23)
10	Nov 18 1994	X	Reply brief of appellant filed.
11	Nov 28 1994		REDISTRIBUTED. December 2, 1994 (Page 15)
13	Dec 5 1994		REDISTRIBUTED. December 9, 1994 (Page 15)
15	Dec 9 1994		ORDER: The Court defers noting probable jurisdiction so that the United States District Court for the Western District of Louisiana, by re-entering its judgement, can cure a procedural defect arising from that court's having entered judgment prior to the issuance on July 27, 1994, of this Court's judgment in Louisiana v. Hays, No. 93-1539. This order shall be sent to the District Court forthwith. The District Court shall immediately re-enter its judgment. This court will then note probable jurisdictionand consolidate this case with 94-

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Entry	Date	Note	Proceedings and Orders
			627 for briefing and oral argument on the same schedule as if this Court had noted probable jurisdiction today.
16	Dec 12 1994		Probable jurisdiction NOTED. The case is consolidated with No. 94-627, Louisiana v. Hays, and a total of one hour is alloted for oral argument. The stay heretofore entered August 11, 1994, is re-entered as of the date the District Court re-entered its judgment.
			**
17	Jan 23 1995		Brief amici curiae of National Bar Association, et al. filed. VIDED.
19	Jan 27 1995		Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED.
18	Jan 30 1995		Brief amici curiae of Bernadine St. Cyr, et al. filed. VIDED.
20	Jan 30 1995		Joint appendix filed. VIDED.
23	Jan 30 1995		Brief of appellant United States filed. VIDED.
28	Jan 30 1995		Brief amicus curiae of Congressional Black Caucus filed. VIDED.
22	Feb 2 1995		SET FOR ARGUMENT WEDNESDAY, APRIL 19, 1995. (1ST CASE).
24	Feb 14 1995		Record filed.
		*	Original record proceedings United States District Court for the Western District of Louisiana (5 BOXES)
25	Feb 14 1995	G	Motion of the Solicitor General for divided argument filed.
27	Feb 17 1995		Order extending time to file brief of appellee on the merits until March 15, 1995.
30	Mar 3 1995		CIRCULATED.
29	Mar 6 1995		Motion of the Solicitor General for divided argument GRANTED.
31	Mar 10 1995	X	Brief amicus curiae of Pacific Legal Foundation filed. VIDED.
32	Mar 15 1995	X	Brief of appellees Ray Hays, et al. filed. VIDED.
33	Mar 15 1995	X	Brief amici curiae of South Carolina Senate, et al. filed.
34	Mar 15 1995		LODGING consisting of one document containing two maps submitted by counsel for amici, South Carolina Senate, et al.
35	Mar 15 1995	X	Brief amicus curiae of Institute for Justice filed. VIDED.
40	Mar 15 1995	X	Brief amici curiae of Ruth O. Shaw, et al. filed. VIDED.
36	Apr 11 1995	X	Reply brief of appellants Louisiana, et al. filed. VIDED.
37	Apr 12 1995	X	Reply brief of appellant United States filed. VIDED.
38	Apr 19 1995		ARGUED.

Supreme Court, U.S.
FILED

(1)

94 558 SEP 26 1994

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, APPELLANT

v.

RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the intentional creation of a majority-minority district is always subject to strict scrutiny.

2. Whether the boundaries of District 4 in Louisiana's redistricting plan are so bizarre on their face that they can be understood only as an effort to segregate voters into separate districts because of their race.

3. Whether the State's creation of District 4 is narrowly tailored to further a compelling interest.

PARTIES TO THE PROCEEDING

Plaintiffs are Ray Hays, Edward Adams, Susan Shaw Singleton and Gary Stokely.

Defendants are Edwin Edwards, Governor of the State of Louisiana; Samuel B. Nunez, President of the Louisiana State Senate; John A. Alario, Speaker of the Louisiana House of Representatives; W. Fox McKeithen, Secretary of State of Louisiana; and Jerry Fowler, the Commissioner of Elections for the State of Louisiana.

The United States intervened as a defendant.

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  § 5, 42 U.S.C. 1973c 2, 3, 5, 8, 11, 17, 19
28 C.F.R. 51.3 3

In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

UNITED STATES OF AMERICA, APPELLANT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The second opinion of the three-judge district court (App., *infra*, 1a-23a) is not yet reported. The first opinion of the three-judge district court (App., *infra*, 39a-109a) is reported at 839 F. Supp. 1188, vacated, 114 S. Ct. 2731.

JURISDICTION

The judgment of the three-judge court was entered on July 26, 1994. App., *infra*, 24a-26a. A notice of appeal was filed on July 26, 1994. App., *infra*, 115a-116a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The relevant statutory provisions are Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. 1973, 1973c, which are reproduced in the Appendix, *infra*, 117a-119a.

STATEMENT

This case concerns a challenge to a congressional redistricting plan adopted by the State of Louisiana which contains two majority-minority districts. A three-judge court invalidated the plan after finding that one of those districts violated the standards for race-conscious redistricting established in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993). The United States, a defendant-intervenor below, has appealed from that judgment. The State of Louisiana has also appealed.

1. The population of the State of Louisiana is more than 30% black. Blacks comprise 28% of Louisiana's voting age population and nearly 28% of its registered voters. From Reconstruction until the 1980s, black voters had not been in the majority in any of that State's congressional districts. As a result of litigation following the 1980 census, a three-judge court ordered redistricting which resulted in blacks constituting a majority in one of the State's eight congressional districts. *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court).

In 1991, Louisiana redistricted the eight districts of the Board of Elementary and Secondary Education (B.E.S.E.). Traditionally, the boundaries of the eight B.E.S.E. districts had been similar to the boundaries of the State's congressional lines. The new B.E.S.E. plan created only one majority-minority district. Louisiana, a State covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, submitted the plan to the Justice Department for preclearance. Acting on behalf of the Attorney General (28 C.F.R. 51.3), the Assistant Attorney General for the Civil Rights Division interposed an objection under Section 5, stating that the State's minority population was large enough and compact enough to create two majority-minority districts, and that the State had not carried its burden of showing that its decision to create only one such district did not have a discriminatory purpose. DX 16-17. In response to that objection, the State adopted a new plan that created two majority-minority districts, which the Assistant Attorney General then precleared.

As a result of the 1990 Census, Louisiana lost one of its congressional seats. App., *infra*, 55a. In May, 1992, the State legislature enacted a districting plan for the seven remaining seats. *Id.* at 39a. That plan included two majority-black districts: One was centered in the City of New Orleans and was similar to the majority-black district in the plan used in the 1980s; the other (District 4) was a Z-shaped district that began in the northwest corner of the State, went east along the State's northern border, ran south down the Mississippi River to the center of the State, and ended with three western extensions. *Id.* at 41a, 62a-63a. The State's plan was precleared by the Department of Justice.

Appellees, four voters living in Lincoln Parish, Louisiana, challenged that plan on the ground that it segregated voters into districts on the basis of race, in violation of the Equal Protection Clause. App., *infra*, 42a. In December, 1993, a three-judge court ruled in favor of appellees. *Id.* at 39a-109a. The court held that "[a] legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race." *Id.* at 48a. In the court's view, that intent may be proven "*indirectly* or *inferentially* * * * when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose" or "by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race." *Id.* at 50a. The court found that appellees had proven racial gerrymandering in both ways. *Id.* at 51a.

Applying strict scrutiny, the court assumed that the State had one or more compelling interests in creating a second majority-black district. App., *infra*, 79a. The court went on to hold, however, that the State's plan was not narrowly tailored to further those interests for two reasons. First, the court found that the plan packed more black voters into District 4 than was "reasonably necessary to give blacks a realistic chance to determine the outcome of elections there." *Id.* at 83a. The court noted that while blacks clearly have a realistic chance to elect candidates of their choice in a district that is 55% black in voting age population, District 4 was 63% black in voting age population. *Id.* at 83a-84a. Second, the court found that "a second black majority district could have been drawn that would have done substantially less violence to traditional redistricting principles." *Id.* at 85a.

The State appealed. While that appeal was pending, the State passed a new redistricting plan (Act

1), with a newly configured majority-minority District 4. That plan was precleared by the Department of Justice under Section 5. On June 27, 1994, this Court vacated the district court's judgment and remanded the case for further proceedings in light of the new plan. App., *infra*, 2a.

2. Appellees then filed an amended complaint, challenging new District 4 on equal protection grounds. App., *infra*, 2a. The United States intervened to defend the plan. The court then held a two-day trial. *Ibid.*

The evidence at trial showed that the legislative aide who drafted the new plan, Glenn Koepp, was given instructions by two state senators to attempt to devise a plan that would accommodate the concerns expressed in the district court's 1993 opinion, while still creating a second majority-black district. Koepp Test., 7/21/94 A.M. Tr. 5-8. To accomplish these purposes, the senators suggested that Koepp model the district on old District 8, a district that the State had used in plans in the 1970s. *Id.* at 11. Old District 8 generally began in the western part of the State, included areas along the Red and Mississippi Rivers as it moved in a southeast direction, and ended beyond Baton Rouge. App., *infra*, 111a-114a. One version of old District 8 in use from 1971-1972 ran from the western border of the State all the way east to Lake Ponchartrain. *Id.* at 112a. During redistricting hearings, the state Senate was shown maps of various versions of old District 8. State's Exh. 1 (Senate Comm. Tr. 236-253, 270).

Blacks are geographically concentrated in much of the area covered by the various configurations of old District 8, particularly along the Red and Mississippi Rivers. Koepp Test., 7/21/94 A.M. Tr. 13-

14; Hillard Test., 7/21/94 P.M. Tr. 67. The area along the Red River Valley is also an important economic region and the people in that region share common interests. Hillard Test., 7/21/94 P.M. Tr. 47-48.

Using old District 8 as a model, Koepp devised new District 4. The new district begins in the northwest part of the State near Shreveport, runs diagonally southeast along the Red River to Alexandria, and then further southeast along the Mississippi River past Baton Rouge. App., *infra*, 110a. The district is approximately 55% black in registered voters. Koepp Test., 7/21/94 A.M. Tr. 17. In devising the district, Koepp tried to keep small towns, precincts, and parishes intact, retain existing districts as much as possible, reflect communities of interest, and separate incumbents. *Id.* at 8, 14-26; Brinkhaus Test., 7/22/94 A.M. Tr. 11, 31-32. To satisfy the one person, one vote rule and other objectives in the plan, 14 of Louisiana's 64 parishes were divided. Koepp Test., 7/21/94 A.M. Tr. 11. The plan used in the 1980s had divided seven parishes. App., *infra*, 65a.

The legislature made several minor adjustments in the plan to satisfy incumbents' concerns about the political makeup of their districts. Koepp Test., 7/21/94 A.M. Tr. 48; Bagneris Test., 7/21/94 P.M. Tr. 119. Those adjustments made District 4 somewhat more irregular. State's Exh. 11.

Voting in Louisiana is racially polarized, and blacks in Louisiana have not been elected to Congress except from districts in which blacks have constituted a majority of registered voters. Engstrom Test., 7/21/94 P.M. Tr. 16-18; State's Exh. 13. Aware of that reality, the state legislature attempted to create a second majority-minority district in order to comply with the requirements of Sections 2 and 5 of the Voting Rights Act, and to continue to remedy Louisiana's history of discrimination in voting. Koepp Test., 7/21/94 A.M. Tr. 18-22; Bagneris Test., 7/21/94 P.M. Tr. 106-107, 110; Brinkhaus Test., 7/22/94 A.M. Tr. 6, 24-27.

3. On July 25, 1994, the district court held the new plan unconstitutional. App., *infra*, 24a-26a. The district court enjoined further use of the plan, and required 1994 elections to be held under a plan drawn by the court. *Ibid.* The court did not afford the parties an opportunity to examine or raise objections to its plan. The court's plan creates one majority-black district; all other districts are less than 30% black in registered voters. *Id.* at 33a. Under the court's plan, Cleo Fields, who currently represents the majority-black district the court found unconstitutional in its first opinion, is paired with a white incumbent in a district that is more than 70% white. No other incumbents are paired.

The district court issued an opinion explaining its decision on July 29, 1994. App., *infra*, 1a-23a. That opinion also readopts the court's first opinion. *Id.* at 2a. The court first found that "the bizarre and irregular shape of District Four raises an inference that the Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly." *Id.* at 3a. That finding, the court held, shifted the burden to the State and the United States to rebut that inference. *Ibid.*

After reviewing all the evidence, the court concluded that "Act 1 can only be explained credibly as the product of race-conscious decisionmaking." App., *infra*, 4a. In support of that conclusion, the court relied primarily on the fact that the legislators who testified admitted that race played a "large if not dominant role in the map as it is now drawn." *Ibid.* The court rejected the State's contention that non-racial considerations also played an important role in the drawing of District 4. In the court's view, the State's assertion that the residents along the Red River had common interests was a "*post hoc* rationalization." *Id.* at 4a-5a. The court also concluded that the State's assertion that it relied on the design of old District 8 was "mere pretext." *Id.* at 5a. While the court acknowledged that "other factors" affected the way in which District 4 was drawn, the court concluded that the "*fundamental factor driving Act 1 was race.*" *Ibid.*

The court then held that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." App., *infra*, 5a. The court noted that this Court had applied a more deferential standard to race-conscious redistricting in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977) (*UJO*). App., *infra*, 5a. The court concluded, however, that *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), undermined the holding in *UJO*, and required strict scrutiny of all race-conscious redistricting. App., *infra*, 6a.

The court went on to hold that the State had not proven that its consideration of race was supported by a compelling interest. App., *infra*, 6a-7a. The court concluded that Section 5 "cannot be read to compel the results of Act 1" because "[n]either the State nor the Department of Justice offered any evidence suggesting that failure to create a second majority-minority district would either be a retrogression of minority strength or have an illegal purpose or effect." *Id.* at 8a. The court further concluded that a second majority-minority district was not compelled by Section 2 because proof of a "numerous and compact minority" is a precondition for a Section 2 dilution claim and "the evidence convincingly proves that the State cannot clear [that] hurdle." App., *infra*, 8a. Finally, the district court rejected the State's assertion that the creation of a majority-minority district furthered the State's interest in remedying its history of racial discrimination. *Id.* at 9a-10a. The court concluded that "[w]ithout concrete evidence of the lingering effects of past discrimination * * * we cannot agree that the resegregation of Louisiana by racially configured voting districts is warranted." *Id.* at 10a.

Turning to the question of remedy, the court stated that it had adopted its own plan because of "the lateness of the hour, the dismal history of the Legislature in two previous attempts, foot-dragging by the defendants in the appeals and the risk that Louisiana might be without Congressional representation in January 1995." App., *infra*, 10a. The court noted that its plan "split only 6 parishes," followed "traditional lines," divided only one town, and "ignore[d] all political considerations." *Id.* at 10a-11a.

Chief Judge Shaw issued a separate opinion, also joined by Judge Wiener, which generally tracked the findings and conclusions of the court. App., *infra*, 13a-23a. Chief Judge Shaw believed that District 4 "completely disregards the traditional districting principles of compactness, respect for political subdivisions, and respect for commonality of interests." *Id.* at 15a. He also stressed that the "old eighth district was never challenged on constitutionality" and therefore has "no application to this case." *Id.* at 18a.

On August 11, 1994, this Court stayed the district court order, permitting the 1994 congressional elections to proceed under the State's plan.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court should note probable jurisdiction of this appeal. The district court has seriously misconstrued this Court's decision in *Shaw* and has decided several related questions that are of substantial importance in voting rights litigation now pending throughout the country. Unless reversed, the court's decision will significantly hamper state efforts to comply voluntarily with the Voting Rights Act. Full briefing and argument is therefore warranted.

1. The district court held that "race conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." App., *infra*, 5a. That holding is inconsistent with *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977). In *UJO*, seven of the eight Justices participating voted to uphold a plan that deliberately created majority-minority districts without subjecting that plan to strict scrutiny. Five Justices specifically agreed that the intentional creation of majority-minority districts is not unconstitutional, absent proof that the proposed plan has the intent and effect of diluting the majority's voting strength. See *id.* at 165 (opinion of White, J. joined by Stevens & Rehnquist, JJ.); *id.* at 179-180 (Stewart, J. joined by Powell, J., concurring).

In adverting to that issue in *Shaw*, this Court "express[ed] no view as to whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim." 113 S. Ct. at 2828. The Court did not purport to overrule *UJO*. Instead, it distinguished *UJO* on the ground that the State in that case had "adhered to traditional districting principles." *Id.* at 2829. This Court also repeatedly stated in *Shaw* that its holding was limited to those rare cases when a State creates a district that is "*so extremely irregular on its face* that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Id.* at 2824 (emphasis added); *id.* at 2825, 2826, 2828, 2830. The district court's holding that Louisiana's admitted intent to create a majority-minority district automatically triggered strict scrutiny is therefore in conflict with *UJO* and unsupported by *Shaw*.

The district court's holding has widespread implications. As Justice White has stated, "bloc voting by race * * * is a fact of life well known to those responsible for drawing electoral district lines. These lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district." *Beer* v. *United States*, 425 U.S. 134, 144 (1976) (White, J., dissenting). In such circumstances, a holding that the intentional use of race to draw district lines is automatically suspect has the potential to make a wide range of redistricting plans at all levels of government constitutionally suspect.

Moreover, Sections 2 and 5 of the Voting Rights Act often require race-conscious redistricting. Under the district court's decision in this case, however, race-conscious redistricting undertaken to comply with Sections 2 and 5 will invariably be treated as constitutionally suspect. The inevitable result will be to chill voluntary compliance by the States with those important statutes.

In addition to the district court in this case, four other three-judge courts have addressed the question whether race-conscious redistricting always triggers strict scrutiny. Those decisions reflect a full range of views on when strict scrutiny is required. In *DeWitt* v. *Wilson*, No. CIV-S-93-535 (E.D. Cal. June 27, 1994), slip op. 4, the district court held that "in redistricting, consciousness of race does not give rise to a claim of racial gerrymandering when race is considered along with traditional redistricting principles, such as compactness, contiguity, and political boundaries." In *Vera* v. *Richards*, C.A. No. H-94-0277 (S.D. Tex. Aug. 17, 1994), the court reached the same conclusion. That court held that strict scrutiny is appropriate only when a district is "highly irregular" and ignores "traditional districting criteria." Slip op. 92. In contrast, in *Shaw* v. *Hunt*, No. 92-202-CIV-5-BR (E.D.N.C. Aug. 1, 1994), slip op. 40-41, the district court held that strict scrutiny is appropriate whenever "racial considerations played a 'substantial' or 'motivating' role in the line-drawing process, even if they were not the only factors that influenced that process." Finally, in *Johnson* v. *Miller*, No. 194-008 (S.D. Ga. Sept. 12, 1994), slip op. 37, the court held that strict scrutiny is applicable when race is the "*overriding, predominant force* determining the lines of the district," but does not apply when race is "one factor among *many of equal or greater significance*." That wide divergence of views on the threshold question of when strict scrutiny is required reinforces the conclusion that the issue is one that warrants this Court's plenary consideration. This case presents an appropriate vehicle for resolving that issue.

2. The district court went on to find that District 4 is "bizarre" and "can only be explained credibly as the product of race-conscious decisionmaking." App., *infra*, 3a. This case therefore also raises the question of the proper approach in determining that important *Shaw* issue.

a. Because the Constitution does not require a State to tailor its districts to any absolute measure of compactness, *Shaw*, 113 S. Ct. at 2827, the manner in which the State has drawn and continues to draw other districts is a proper benchmark for determining whether a particular majority-minority district is "bizarre." A bizarre district is one that reflects an extraordinary departure from a State's usual districting practices. See *Cane* v. *Worcester County, Maryland*, No. 94-1579 (4th Cir. Sept. 16, 1994), slip op. 9 n.6; cf. *Jeffers* v. *Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989), aff'd mem., 498 U.S. 1019 (1991). The manner in which the State has drawn other districts is also relevant in deciding whether a particular majority-minority district "on its face * * * rationally can be viewed only as an effort to segregate the races for purposes of voting." *Shaw*, 113 S. Ct. at 2824. When a district resembles districts that a State has drawn for reasons having nothing to do with creating a majority-minority district, it is improper to conclude that such a district can only be understood as a racial gerrymander.

Application of these principles leads to the conclusion that Louisiana's District 4 should not have been subjected to strict scrutiny under *Shaw*. First, that district resembles the Eighth District in congressional plans that the State used from 1967-1972.

App., *infra*, 110a-112a. The plans in use between 1973 and 1992 also contained a district in the same general area. *Id.* at 113a-114a. In none of these districts did blacks constitute a voting majority. Given that history, District 4 cannot be considered bizarre on its face. Nor can it be understood solely as an effort to segregate voters on the basis of race.

Quite apart from its resemblance to old District 8, the shape of District 4 fits comfortably within the State's ordinary districting practices. As the map of the State's plan illustrates (App., *infra*, 110a), District 4 is reasonably compact and contiguous. It is generally wide and straight. Unlike old District 4, it does not meander over disconnected parts of the State, nor is it comprised of a series of "fingers" reaching out from the core. District 4 follows the Red River and then the Mississippi River, two important geographical features in the State, and the population that is concentrated along those rivers shares common interests.

District 4 is not a square or circle. *Shaw*, however, does not treat as suspect any deviation from geometric regularity. Suspect treatment is reserved for truly bizarre districts that, on their face, evidence a single-minded pursuit of racial goals, with little or no consideration for other districting values. District 4 is not such a district. It reflects a conscientious effort to create a majority-minority district, while simultaneously pursuing other traditional Louisiana districting values. It is therefore not suspect under *Shaw*.[1]

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[1] The relevant inquiry under *Shaw* is whether the district as a whole is bizarre, not whether isolated segments of it are. Virtually every redistricting plan will have some lines that, when viewed in isolation, look quite irregular, and this plan is no exception. It is worth noting that some of the less regu-

b. The district court rejected the State's reliance on the fact that District 4 resembles old District 8 and encompasses a community of interest along the Red and Mississippi Rivers as "*post hoc* rationalization" and "mere pretext." App., *infra*, 5a. In reaching that conclusion, the court relied primarily on the admissions of state legislators that race played a large role in the drawing of District 4. *Ibid.* The district court's analysis is flawed for two reasons.

First, the relevant inquiry under *Shaw* is whether a district is so bizarre *on its face* that it can be understood only as a racial gerrymander. 113 S. Ct. at 2824. Those terms mandate an objective inquiry, not an inquiry into the legislature's subjective intent based on after-the-fact statements made by legislators. *Johnson* v. *Miller*, slip op. 7-8 (Edmondson, J., dissenting). The resemblance of District 4 to old District 8 and the presence of a community of interest along the Red and Mississippi Rivers are objective indications that District 4 is not bizarre and cannot be understood solely as an effort to segregate voters on the basis of race. Those factors are therefore of crucial relevance in evaluating appellees' *Shaw* claim. Conversely, the fact that state legislators conceded that the State intended to draw a majority-minority district is not determinative of a *Shaw* claim. Under *Shaw*, there is nothing suspect about a State's desire to draw a majority-minority district.

Second, the district court seems to have misunderstood what the State sought to prove by introducing

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lar lines at the mid-point of District 4 were constructed to satisfy the political preferences of incumbent legislators, a routine consideration in the enactment of redistricting plans; other unusual looking lines in the district follow oddly shaped precinct lines. Koepp Test., 7/21/94 A.M. Tr. 30, 48; Bagneris Test., 7/21/94 P.M. Tr. 119; Brinkhaus Test., 7/22/94 A.M. Tr. 9, 14.

evidence that District 4 resembles old District 8 and includes persons with common interests. The point of the evidence was not to show that race played no role in the drawing of District 4; it admittedly played an important one. Rather, the point of that evidence was to show that the State was attempting to draw a majority-minority district in a way that was consistent with other traditional redistricting interests. The State's acknowledgement that it intended to create a majority-minority district is not at all inconsistent with its assertion that it also took into account the traditional districting values served by creating a district that resembled prior districts and that included persons with common interests. That acknowledgement provides no basis for the court's finding that the State's reliance on those other factors was pretextual.[2]

The reasons given by Chief Judge Shaw for finding the State's plan suspect under *Shaw* are equally unpersuasive. Chief Judge Shaw concluded that the State's plan "completely disregards" the traditional districting principle of respect for political subdivisions because District 4 splits 12 parishes and four cities. App., *infra*, 15a-17a. In Louisiana, however, parish and city lines have never been sacrosanct. The

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[2] In rejecting the State's reliance on old District 8, the district court also attributed significance to the fact that it was "never challenged" and "was crafted for the purpose of ensuring the reelection of Congressman Gillis Long." App., *infra*, 5a. Legislation that has not been challenged, however, is presumptively constitutional. Moreover, if old District 8 was drawn to ensure the reelection of an incumbent nonminority Congressman, then, in the absence of any significant demographic changes in the region, it calls into question the conclusion that District 4, which follows similar lines and directions, can be understood only as an effort to segregate black and white residential areas.

1980 redistricting plan divided seven parishes, and the court's own plan divided six. *Id.* at 10a-11a, 65a. Congressional redistricting plans throughout the twentieth century have split the city of New Orleans. U.S. Exh. 4. District 4's splitting of parish and city lines does not make it bizarre.

Chief Judge Shaw also concluded that the State's plan completely disregards the traditional principle of "respect for commonality of interests" because District 4 includes different religious groups and different agricultural interests. App., *infra*, 15a, 17a. With only seven districts, however, it is impossible for Louisiana to create districts composed of persons who have similar interests on every conceivable social and economic issue. Uncontradicted evidence shows that persons in District 4 share some important common interests. Hillard Test., 7/21/94 P.M. Tr. 47-48. Chief Judge Shaw's view that the State should have given greater weight to religious and agricultural differences reflects his own redistricting preferences. It does not show that District 4 is bizarre.

3. Even if the district court were right in subjecting District 4 to strict scrutiny, it erred in concluding that the State did not have a compelling interest in drawing a second majority-minority district. In *Shaw*, this Court provided some general guidance on how to determine whether a State has a compelling interest in creating a majority-minority district. 113 S. Ct. at 2830-2832. This case provides an opportunity to provide more concrete guidance on that central issue.

a. A State has a compelling interest in complying with Sections 2 and 5 of the Voting Rights Act. See *Shaw*, 113 S. Ct. at 2830. The district court did not suggest otherwise. Instead, reviewing the evidence *de novo,* the district court concluded that the State's creation of District 4 was not compelled by Section 2 or Section 5. App., *infra,* 6a-9a. Under this Court's decisions, however, a State is not required to show that its actions were in fact required by law in order to take remedial action. A State need only show that it had a "strong basis in evidence" for its actions—a standard that is satisfied if the State reasonably believes that its failure to take the measure would lead to a prima facie case of discrimination against it. *City of Richmond* v. *J.A. Croson Co.,* 488 U.S. 469, 500 (1989); *Wygant* v. *Jackson Bd. of Educ.,* 476 U.S. 267, 292-293 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

With regard to Section 2, a State would have a compelling interest in creating a majority-minority district when the three preconditions for a vote dilution claim set forth in *Thornburg* v. *Gingles,* 478 U.S. 30, 50-51 (1986), are present. See *Shaw* v. *Hunt,* slip op. 62-64. Strong evidence that each of those preconditions existed was present here. The record demonstrates that blacks in Louisiana are politically cohesive and that unless they constitute a majority in a district, their candidates of choice will be defeated by whites voting as a bloc. The record also shows that the concentration of minorities along the Red and Mississippi Rivers is sufficiently large and compact to constitute a majority in a district. Accordingly, the State had a reasonable basis for concluding that the creation of a second majority-minority district was required in order to comply with Section 2.

The district court found that a second majority-minority district was not compelled by Section 2 because no geographically compact district could be drawn. App., *infra,* 8a. The *Gingles* compactness requirement, however, does not demand compactness in any absolute sense. Rather, the question in circumstances like those presented here is whether the proposed majority-minority district is reasonably compact in light of a State's traditional redistricting practices. *Jeffers* v. *Clinton*, 730 F. Supp. at 207. As already noted, District 4 is similar in compactness to previous districts drawn by the State in the same general area. *Gingles* requires no more.

The State also had a reasonable basis for concluding that the creation of a second majority-minority district was required by Section 5. By 1992, the Department of Justice had already refused Section 5 preclearance to the B.E.S.E. plan on the ground that the State had not shown that its failure to create a second majority-minority district was free of discriminatory purpose. DX 16-17. From that experience, the State reasonably believed that it would also have difficulty satisfying its burden to show that its failure to create a second majority-minority congressional district complied with Section 5.

The district court apparently believed that the State could not rely on the Attorney General's objection to its B.E.S.E. plan, but was required to show that the objection was in fact a legally valid one. App., *infra*, 7a & n.3. That approach was incorrect. The Attorney General is required under Section 5 to object to a redistricting plan when the State is unable to demonstrate that it is free of discriminatory purpose. *City of Richmond* v. *United States*, 422 U.S. 358, 372-373 (1975). The Attorney General's objection based on such a determination constitutes an "administrative finding of discrimination." *Regents of the Univ. of Calif.* v. *Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.); *Shaw* v. *Hunt*, slip op. 67-69. Such a finding provides the

State with a basis for believing that remedial action is necessary. *Ibid.*

b. Independent of its obligations under the Voting Rights Act, the State had a compelling interest in ameliorating the effect that racially polarized voting has had on the opportunity for minority voters in Louisiana to elect the candidates of their choice. See *Croson*, 488 U.S. at 491-493 (opinion of O'Connor, J.). When whites persist in voting as a bloc against minority preferred candidates, a State can take steps through redistricting to "alleviate the consequences of racial voting at the polls." *UJO*, 430 U.S. at 166-168 (opinion of White, J., joined by Stevens & Rehnquist, JJ.).

The district court determined that there are no lingering effects of discrimination that would justify such remedial action. App., *infra*, 10a. That determination ignores the persistence of racially polarized voting in the State. As recently as 1983, Louisiana was ordered by a federal court to create its first majority-minority district in the New Orleans area in order to comply with the Voting Rights Act. *Major* v. *Treen*, *supra*. And based on the evidence before it, the State had every reason to believe that unless it created an additional district in which blacks constituted a majority, bloc voting by whites would preclude minority voters from having any realistic chance to elect a second representative of their choice.[3]

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[3] The district court's opinion does not address the issue of narrow tailoring. We nonetheless note that the State's plan could not be more narrowly tailored to further its compelling interests. It creates a second majority-black district in the very place in which minority voters are geographically concentrated, and it does so in a way that is consistent with the State's other redistricting interests. Nor does the plan need-

4. As already noted, there are now five decisions by three-judge courts addressing the issues raised by *Shaw*. In addition to Louisiana, the States involved are California, Georgia, Texas, and North Carolina. All of those cases involve congressional redistricting; all either have been or will be appealed to this Court. The present case raises, in a straightforward way, the most important questions left undecided by *Shaw*. It clearly warrants plenary consideration by this Court.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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SEPTEMBER 1994

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lessly pack minority voters into the district: blacks constitute 55% of the registered voters in the district, very close to the minimum percentage necessary to provide minority voters with an opportunity to elect a candidate of their choice.

APPENDIX A

[Filed Jul 29, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

No. 92-1522

RAY HAYS, ET AL., PLAINTIFFS

versus

STATE OF LOUISIANA, ET AL., DEFENDANTS

Before Wiener, Circuit Judge, Shaw, Chief District Judge and Walter, District Judge. Walter, J., Wiener and Shaw, JJ. concurring, with Shaw concurring specially with whom Wiener, J. concurs:

By order dated June 27, 1994, this case was remanded from the United States Supreme Court for further proceedings. For the following reasons, Act 1 of the Second Extraordinary Session of the 1994 Louisiana Legislature is null and void. The State of Louisiana is hereby enjoined from holding any future Congressional elections based upon the redistricting scheme embodied by Act 1.

I

STATEMENT OF THE CASE

Ray Hays, Edward Adams, Susan Singleton, and Gary Stokely ("Plaintiffs") brought this suit in state court in August 1992 challenging Act 42 of 1992. The case was removed to this Court by the State of Louisiana. After one trial and an evidentiary hearing, we struck down Act 42 as an impermissible racial gerrymander violative of Plaintiffs' equal protection rights. The State of Louisiana et al. ("Defendants") pursued their appeal directly to the Supreme Court. Meanwhile, during an extraordinary session, the Louisiana Legislature enacted Act 1, repealing Act 42 and creating a new Congressional redistricting scheme. Plaintiffs filed supplemental pleadings seeking to amend their complaint. The amended pleadings challenged Act 1 and sought injunctive relief. As the case was on appeal to the Supreme Court, the motions were returned unsigned for lack of jurisdiction. On June 27, 1994, the Supreme Court vacated our judgment of December 29, 1993; remanded the case to this Court "for further consideration in light of Act 1 of the Second Extraordinary Session of the 1994 Louisiana Legislature and the parties' filings in this Court concerning Act 1." Consistent with that order, this Court permitted the previously filed amended complaint and a two-day trial was held to determine the constitutionality of Act 1.

II

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the interest of brevity, we reiterate and adopt by reference our December 28, 1993 opinion. Our conclusions regarding Plaintiffs' standing to bring an equal protection challenge are adopted as well. With that in mind, we make the following findings:

A

"The Act (1) speaks for itself"

The districting map of Louisiana, created under Act 1, reflects a racial gerrymander. Specifically the bizarre and irregular shape of District Four raises the inference that the Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly. The district cuts across historical and cultural divides, splits twelve of its fifteen parishes and divides four of the seven major cities of the State. The statistical evidence showing the racial composition of the districts further supports the finding that District Four is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Shaw v. Reno*, 113 S.Ct. 2816 (1993).[1] Plaintiffs, by submitting the new map with their supplemental pleadings, stated a claim upon which relief can be granted under the Equal Protection Clause. We ordered the State of Louisiana and Defendant-Intervenor United States to begin the trial by rebutting this inference.

Defendants offered the testimony of two State Senators, the State Senate's assistant secretary, a geographer, and a sociologist in an effort to explain the shape of the district on other than impermissible racial grounds. Those persons involved directly with the formation of Act 1 acknowledged that the creation of a second majority-minority district was the specific intent of the Legislature. Two race-neutral explanations were submitted by the defense. First, the geographer opined that as District Four followed the Red River valley, it endowed all its residents with a commonality of interest. Second, the various witnesses asserted that District Four was inspired by "the old Eighth" district thereby satisfying the concept of "traditional" districting principles.

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[1] The State now concedes that Act 42 was bizarre. In our opinion of December 28, 1993, we called for major surgery. Act 1 is at best a cosmetic makeover.

The starting point, following the 1990 census, was to redistrict for seven congressional districts, instead of eight, Louisiana having lost one member of Congress. Next, the State sought to comply with the Constitutional requirement of one man-one vote. In this case, each district should contain, as closely as practicable, 603,853 citizens. The State's evidence clearly shows what happened next: Misinterpreting our opinion of December 1993 as approving a racially gerrymandered district if it contained no more than 55% minority registered voters; and remaining convinced that the Department of Justice would not preclear any plan that did not contain two majority/minority districts, the Legislature embarked on an endeavor to comply with those demands and still secure adoption. These were the only inflexible features given to the cartographer/demographer in charge of generating the seven districts.

After reviewing the evidence, we find that Act 1 can only be explained credibly as the product of race-conscious decisionmaking. The Senators themselves admitted that race played a large if not dominant role in the map as it is now drawn. The Red River valley theory is clearly a *post hoc* rationalization similar to the Mississippi River theory offered to support Act 42 and equally unbelievable. The State did not imitate the "old Eighth" for tradition's sake.[2] The "old Eighth," certainly bizarre, before *Shaw* and never challenged, was crafted for the purpose of ensuring the reelection of Congressman Gillis Long. New District Four was drafted with the specific intent of ensuring a second majority-minority Congressional district. The State's purported reliance on District Four's similarity to the "old Eighth" is mere pretext. Although the witnesses highlighted other factors that carved the contours of the awkward district, the *fundamental factor driving Act 1 was race.*

B

ACT 1 IS SUBJECT TO STRICT SCRUTINY

Race-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny. This conclusion has troubled legislators, scholars, litigators, and judges alike. T. Alexander Aleinikoff, Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 602 ("Aleinikoff"). The problem is caused by the incomplete constitutional status of affirmative action plans in the voting rights realm. In *United Jewish Organization v. Carey*, 430 U.S. 144 (1977), the Supreme Court applied a more deferential standard to what the plurality deemed "benign" measures. One year later, the Court decided *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) following the theory that "the right not to be injured on the basis of one's skin color was a personal right secured by the Constitution, and the asserted lack of an invidious purpose could not be a sufficient reason for reducing the level of judicial scrutiny applied to measures that disadvantaged persons on the basis of race." Aleinikoff, 92 Mich. L. Rev. at 592. Eleven years later, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) confirmed the motion that, since *Bakke*, the scrutiny applied under the Fourteenth Amendment Equal Protection Clause will not vary based on the race of the preferred group. 488 U.S. at 493. *Shaw* is consistent with the more recent equal protection precedents, focusing on individual rights as opposed to *UJO*'s group-based approach. Aleinikoff, 92 Mich. L. Rev. at 600. By not overruling *UJO*, *Shaw v. Reno* can be read to ratify "the earlier group-based decisions which focus on whether electoral schemes 'dilute' the voting strength of protected minorities [while making clear] that the fact of non-dilution does not immunize districting plans from constitutional challenge." *Id.*

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[2] In fact, District Four incorporates the "old Eighth" only in part. It shoves the top further north into Shreveport, further south into Baton Rouge and shortens it to the east.

"A racial classification, despite purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts v. Feeny*, 442 U.S. 256, 272, 99 S.Ct. 2282, 2293 (1979). Therefore, such legislation must be narrowly tailored to further a compelling government interest if it is to pass constitutional muster.

C

COMPELLING GOVERNMENTAL INTEREST

Defendants have proved no compelling governmental interest in distinguishing among citizens of

Louisiana because of their race. Defendants contend that incumbency politics, the Voting Rights Act, and remedying past legal and social or continuing social discrimination justified the racial segregation of voters. We disagree.

We note at the outset that incumbency politics cannot justify racial classifications. Adhering to federal anti-discrimination laws and remedying past or continuing discrimination could constitute compelling governmental interests if the State could "demonstrate a strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 510, 109 S.Ct. at 730. Such a basis may be drawn from judicial, legislative, or administrative findings of constitutional or statutory violations.

1

Voting Rights Act

The State Legislature believed that the Voting Rights Act compelled the creation of a second majority-minority district.[3] A careful review of those statutes and the caselaw interpreting them reveals that the State's belief was misplaced.

Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the State has an affirmative duty to avoid retrogression or enactment of a plan that has the purpose or effect of denying or abridging the right to vote because of race or color. Neither the State nor the Department of Justice offered any evidence suggesting that failure to create a second majority-minority district would either be a retrogression of minority strength or have an illegal purpose or effect. Not surprisingly, we can find no support for such a claim either. Section 5 cannot be read to compel the results of Act 1.

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[3] This belief was encouraged, if not demanded, by the Department of Justice, under an actual or implied threat of withholding Section 5 pre-clearance. The shield became a sword. Whether the Attorney General had the right to withhold pre-clearance may be open to question, but she certainly had the power, and the threat, whether issued by her or some middle level bureaucrat, was a matter of real concern to the State. Litigation in the District of Columbia, and everywhere else is expensive. We hold, however, that a real concern is not a compelling one.

A Voting Rights Act Section 2 violation occurs when, under the totality of the circumstances, a State's apportionment scheme has the effect of diminishing or abridging the voting strength of a protected class. In *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986), the Supreme Court enumerated three conditions to a Section 2 "dilution" claim: (1) a numerous and compact minority, that is (2) politically cohesive, and (3) subject to majority bloc voting usually defeating the minority's preferred candidate. 438 U.S. at 50-51, 106 S.Ct. at 2766. The evidence convincingly proves that the State cannot clear the first *Gingles* hurdle.[4] Accordingly, Section 2 cannot serve as a compelling justification for Act 1. Certainly the Voting Rights Act would *permit* the creation of a second majority-minority district, but the fact that such a district is permitted does not

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[4] Despite a minority population of approximately 30%, demographic distribution is simply too diffuse (See Gov't Exhibit 2) to generate a majority voting age population in any district outside of the Orleans Parish region. The State's own expert confirmed that Louisiana's minority population is simply not sufficiently concentrated to meet *Gingles* minimum requirements.

compel its creation. *Shaw* demands that we distinguish between what the Voting Rights Act requires and what it permits. 113 S.Ct. at 2830. As for any arguments that Section 2 compels maximization of minority voting strength, the Supreme Court recently held:

> (R)eading Section 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. . . . Failure to maximize cannot be the measure of Section 2.

Johnson v. DeGrandy, —— U.S. ——, —— S.Ct. ——, 1994 WL 285792 (1994). Hence, the State did not have a basis in law or fact to believe that the Voting Rights Act *required* the creation of two majority-minority districts.[5]

2

Remediation of Past or Present Discrimination

Defendants elicited testimony that the sordid history of unconstitutional treatment of black citizens in Louisiana prompted the State to tinker with district lines in order to ensure minority control at the polls. Using the disease as a cure is a dangerous antidote, one that must be absolutely warranted before being administered. Ironically, one witness contended that the days of "white" and "colored" water fountains and bus seats justify distinct "white" and "African-American" congressional districts. What the defense failed to establish is where the Civil Rights Act of 1964 and the Voting Rights Act of 1965 have failed to accomplish what the State now sets out to do. Without concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies, we cannot agree that the re-segregation of Louisiana by racially configured voting districts is warranted.[6] *Croson* and *Bakke* dictate this result.

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[5] A strong basis under *Gingles* does exist, however, to warrant the creation of a majority-minority district in the Orleans Parish region, where one has existed since 1983. *See Major v. Treen*, 574 F.Supp. 325 (E.D. La. 1983).

Finally, we refuse to accept the explanation that citizen response to issues such as education, crime and health care is driven by skin pigmentation. Legitimation of that notion would herald the demise of equal protection.

III

THE COURT'S PLAN

Our strong preference is to leave to the Legislature the task of drawing election districts. We reluctantly set our hands to the task, considering the lateness of the hour, the dismal history of the Legislature in two previous attempts, foot-dragging by the defendants in the appeals and the risk that Louisiana might be without Congressional representation in January 1995. The districts that we drew split only 6 parishes of the sixty-four, followed traditional lines, only one town of approximately 3000 was divided, and the plan met all Constitutional one man-one vote requirements. It did ignore all political considerations. And, instructed by *Gingles*, we did not carve districts along race lines, except in District 2, where the Constitution and fairness requires us to consider it.[7]

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[6] We also note, that accepting *arguendo* the remediation argument as compelling, the defendants utterly failed to demonstrate how gerrymandering could remedy the problems asserted as compelling interests. That is exactly the problem with a sweeping remedy to an amorphous concept. Without properly defining the compelling interest, it is impossible for the State to narrowly tailor any plan.

IV

CONCLUSION

The Equal Protection Clause demands strict scrutiny of government use of race as a dividing line. This is an individual right in addition to any group-based protections that the Amendment affords. When voting districts are carefully planned like racial wards, an *individual* injury occurs. All citizens are stigmatized by the notion that their "interests" can be defined by race or will be represented adequately only if a member of their racial "group" holds a particular office. To reinforce such racial notions by *operation of law* seems to fly in the face of Justice Thurgood Marshall's expressed hope in his argument in *Cooper v. Aaron* that we "learn to live together with fellow citizens, and above all to learn to obey the law."

I find a contrary position strangely at odds with the desires so eloquently voiced, not so long ago, in Shreveport, in Jackson, in Selma, in countless towns across the South, at schools and lunch counters, at voter registrar's offices. They stood there, black and white, certain in the knowledge that the Dream was coming; determined that no threat, no spittle, no blow, no gun, no noose, no *law* could separate us because of the color of our skin. To say now: "Separate!" "Divide!" "Segregate!" is to negate their sacrifice, mock their dream, deny that self-evident truth that all men are created equal and that no government may deny them the equal protection of its laws.

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[7] *See Major v. Treen, note 5 supra.*

The validity of equal protection and the systemic legitimacy of our electoral process are threatened when a State sculpts voting districts along race lines. As here, when the State cannot, or has not, offered and supported an extraordinary justification for these questionable measures, the race-conscious enactments must fall.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Civil Action Number 92-1522

RAY HAYS, ET AL., PLAINTIFFS

versus

EDWIN W. EDWARDS, in his official
capacity as Governor of the State of
Louisiana, ET AL., DEFENDANTS

SHAW, Chief District Judge, concurring:

I concur in the able opinion of the majority. It is an honest effort to provide a suitable plan for Congressional districts in Louisiana within the restraints of the Constitution. I would, however, like to add a few words which may be somewhat repetitive but which address matters in our December 28, 1993 ruling which we have adopted by reference as well as additional findings supported by the evidence. Applying the same constitutional analysis to Act 1 has led us to a similar conclusion.

Again, this Court is called upon to answer the same question: "Does a state have the *right* to create a second racial majority/minority Congressional district by racial gerrymandering?"

The United States Supreme Court has answered that question for this Court in *Shaw v. Reno*,[1] "Yes, but only if the plan is narrowly tailored to further a compelling state interest."

For the following reasons, this Court finds that the Congressional Redistricting Plan embodied in Act 1 and District 4, in particular, is the product of racial gerrymandering and is not narrowly tailored to further any compelling governmental interests. The plaintiffs' right to equal protection as guaranteed by the United States Constitution is violated by this redistricting plan, and as such, the plan is null and void.

Racial Gerrymandering

As stated in our previous opinion, racial gerrymandering is defined as the intentional segregation of voters on the basis of race. This Court is called upon to first determine whether the redistricting plan is the result of racial gerrymandering.

At trial, the witnesses for the State readily admitted that the purpose of District 4 was to create a second black majority district. The testimony of the state legislators and the State Senate Assistant Secretary confirmed that the district lines were driven by the fact that the black population in the State of Louisiana was sufficiently dispersed through the State that it was impossible to create a second majority black district without skewing the lines into a long irregular shape, as demonstrated by District 4 of the plan.

The districting plan embodied in Act 1 is highly irregular in its shape. Though it may be less bizarre than the plan created in Act 42, the physiognomy of District 4 still strongly suggests that the Legislature engaged in racial gerrymandering in creating the district. Looking at District 4 on a map of Louisiana, it appears as if someone knocked over an inkwell somewhere around Waskom, Texas, spilling ink aimlessly across the map of Louisiana. There is simply nothing regular about the contours of District 4.

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[1] 508 U.S. ——, 113 S. Ct. ——, 125 L.Ed.2d 511 (1993).

This Court acknowledges that the appearance or beauty of a district is irrelevant to a constitutional analysis; however, the irregularity in shape of a district is suspect and can indicate racial gerrymandering.

Although *Shaw* discusses the concept of bizarre or irregular shape as a means of demonstrating or inferring racial gerrymandering, the high court in no way indicated that shape alone was a determining factor in a finding of racial gerrymandering.

This Court finds, aside from the irregularity of the shape of this district, the evidence at trial clearly supported a finding of racial gerrymandering. The Louisiana Legislature abandoned traditional districting principles to arrive at a Plan which created two majority black voting districts. Act 1, like Act 42, completely disregards the traditional districting principles of compactness, respect for political subdivisions, and respect for commonality of interests.

a. Compactness

District 4, under Act 1, begins in Caddo Parish, and includes the Parishes of DeSoto, Red River, Sabine, and Natchitoches, all located in clearly defined North Louisiana, and ends in Ascension Parish, after cutting through the French region of Louisiana called "Acadiana," which includes Lafayette, St. Martin, St. Landry, and Evangeline Parishes. The district is approximately 250 miles long, and meanders through 15 parishes, making it considerably longer than any other district in the State. District 4 cuts up four major population centers of Louisiana, including Shreveport, Alexandria, Lafayette, and Baton Rouge, in its efforts to capture sufficient pockets of African-American voters, paying no respect to parish lines.[2] The district points fingers out into Caddo, Rapides, and Lafayette Parishes, while taking small bites out of St. Martin and Iberville Parishes. A district that stretches over as much territory, touching so many media and population centers, cannot be said to be compact.

b. Respect for Political Subdivisions

Although Act 1 is an improvement from Act 42, the state legislature continues to disregard the parish lines in fashioning a plan to create a second minority district.

In the creation of District 4, the State found it necessary to fragment twelve of the fifteen parishes comprising District 4, splitting sixteen parishes under the plan. District 4 is made up of pieces and parts of twelve parishes and splits four of the State's largest cities, outside of New Orleans—Shreveport, Baton Rouge, Lafayette, and Alexandria. Clearly, Act 1 has no respect for Louisiana's political subdivisions.

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[2] This court notes that District 4 covers, not only four major population centers of Louisiana, but includes four separate and major media centers of this state. Congressional candidates would be required to spend substantial amounts of money and time covering the voters in four major areas of the state.

c. Commonality of Interests

To say that District 4 comprises voters with common interests violates all traditional north-south, ethno-religious, economic and historical distinctions in Louisiana which created this State's diverse personality.

District 4 includes North Louisiana English-Scotch-Irish, mainline Protestants, South Louisiana French-Spanish-German Roman Catholics, traditional rural black Protestants, and Creoles. The district encompasses North, Central, and South Louisiana, each of which has its own unique identity, interests, culture, and history. The agricultural regions of District 4 include cotton, soybean, rice, sugar cane, and timber. Such diverse agricultural constituency have few common interests. We continue to question how one Congressional representative could adequately represent the varying interests of residents in such far-flung areas of the State.

A district which disregards commonality of interests and stretches across the State in a haphazard manner without regard to political subdivisions can only be explained as the result of racial gerrymandering.

Justification for Defendant's Plan

The State attempted to put forth a race-neutral explanation for its plan by the use of a geographer who testified that District 4 was drawn along the

Red River Valley demonstrating a commonality of interest. The State failed in its burden of proof to show that the Red River Valley region in the State of Louisiana demonstrated a commonality of interests.

Secondly, the State offered as support for its plan, that District 4 of the plan was modeled after the old eighth district in Louisiana which was created for and represented by Congressman Gillis Long.

This Court is not swayed by the assertion that the tradition of the past regarding the old eighth district is binding on this Court, due to the fact that the old eighth district was never challenged on constitutionality by any court in the United States. This Court is not called upon to determine the constitutionality of the old eighth district, and does not rely on the fact that such a district existed in Louisiana. What was done by the Louisiana Legislature in the old eighth has no application to this case before this Court, and cannot be used as a comparable for the plan before this Court.

Accordingly, this Court finds that the only explanation of the State's Redistricting Plan was racial gerrymandering. The State intentionally segregated voters into Congressional districts on the basis of race, in order to intentionally create a second black majority voting district.

Narrowly Tailored

A racially gerrymandered plan is subject to strict scrutiny, and as such it violates the Equal Protection Clause of the Fourteenth Amendment unless it is narrowly tailored to further a compelling governmental interest.

Compelling Governmental Interest

Again, the State advances two possible compelling state interests to justify their racial gerrymandering: (1) compliance with the Voting Rights Act, and (2) remedying the effects of past discrimination.

a. Compliance with the Voting Rights Act

Section 5 of the Voting Rights Act provides that a state has an affirmative duty to avoid retrogression or to avoid enactment of a plan that has the purpose or effect of denying or abridging the right to vote on account of race.

The defendants established that the Louisiana Legislature was operating under the belief that a second majority-black district was mandated by the Department of Justice to avoid retrogression, and obtain preclearance. Without commenting further regarding the role of the Department of Justice in affecting the plan enacted in Act 1, this Court finds no evidence to support a finding that a second majority-black district is required by Section 5 of the Voting Rights Act, to avoid retrogression. Prior to the census, Louisiana's Congressional delegation had only one black representative out of eight congressmen. Certainly, one congressman out of seven cannot constitute retrogression. Section 5 of the Voting Rights Act does not constitute a compelling governmental interest in this case.

Additionally, Section 2 of the Voting Rights Act prohibits a plan that has the effect of diminishing or abridging the voting strength of a protected class.

However, this claim must fall in the face of the Supreme Court's ruling in *Thornburg v. Gingles.*[3]

This Court finds that Section 2 of the Voting Rights Act is not implicated by this plan. Although the Voting Rights Act would permit a second minority district, such a district is not compelled by the Act.

b. Remedy Past Discrimination

The State advanced, as justification for its racially gerrymandered district, the belief that the creation of a second minority district in Louisiana is mandated to remedy the past discrimination which has existed in Louisiana.

This Court struggled with the concept of how to define "past discrimination" in Louisiana. Certainly, the history of Louisiana, as of most states in the deep South with respect to its treatment of blacks, is indelibly imprinted in our memories. This State, having inflicted great atrocities against minorities, has made great strides in remedying past discrimination, being ever vigilant of its current existence in the attitudes of many of its residents today. Louisiana, in the sense of its history, will always have a history of past discrimination. However, this Court must determine whether this State has a history of past legal discrimination in the voting laws and procedures which compels it to make reparations and remediation.

The Civil Rights Act of 1964 and the Voting Rights Act of 1965 have mandated the elimination of obstacles to minority participation at the polls. Since those turbulent times in Louisiana, and through the efforts of many black and white leaders in this State, we have seen the elimination of poll taxes, literacy tests, and violence to reduce or prohibit African-American participation in our elections process. Louisiana has minority representation in nearly every level of government, in almost every area of the State. Speaking only in the sense of the voting rights of minorities in Louisiana, this Court finds that there exist no significant obstacles for minorities in this State to participate in the elections process which have not been remedied by the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Accordingly, the concept of remedying past discrimination is not a compelling governmental interest in the recent history of Louisiana in the area of voting rights.

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[3] 478 U.S. 30, 106 S. Ct. 2752 (1986).

This Court acknowledges the great benefits that are derived by an increase in minority representation in government, not only for those who are represented but also to the process of government itself. Given the opportunity to serve, minorities have shown that they perform admirably. A greater number of African-American leaders in the government process not only provide positive role models for all black citizens, but their efforts in government will insure that the legal obstacles to minority advancement in all areas of life will be eliminated. However, to disregard the rights of all citizens of the State of Louisiana would violate the Equal Protection Clause of the United States Constitution, and such a plan would do further violence to the ultimate goal of a colorblind system.

Although we found that the evidence presented at the hearing did not support the contention that the

Legislature was operating pursuant to a compelling state interest, even if there had been satisfactory evidence at trial that there is a compelling state interest in creating a second majority-minority Congressional district, the plan embodied by Act 1 was not narrowly tailored to effect that interest. The fact that outside of the Orleans Parish area, the minority black population is relatively dispersed throughout the rest of the State, elicited the question of whether it was even possible to develop a districting plan that creates a second majority-minority district *and* is narrowly tailored, in the sense that the plan in total does not unduly burden the rights of third parties.

The Court Imposed Plan

This Court, with the assistance and guidance of our appointed special master, devised a Congressional Districting Plan. This plan was created from a computer program which included the demographics of the State of Louisiana. This Court started with the goal of creating seven Congressional districts, remaining true to the "one man, one vote" requirement, and the constraints of *Shaw* and *Gingles*.

After considering every combination available, this Court reached the conclusion that the diffused population of black voters in Louisiana, outside of District 2, makes it impossible to draw a Congressional plan which contains two minority-majority districts and passes constitutional muster. Act 1 clearly does not.

Conclusion

While this Court finds that the creation of a second minority-majority district in Louisiana is permissive and advantageous, we do not find it compelling, under the constraints of the Constitution.

This Court applauds the Louisiana Legislature in its efforts to create a second minority district; however, such efforts run aground of the Constitution and the dictates of *Shaw v. Reno*.

APPENDIX B

[Filed Jul. 25, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Civil Action No. CV 92-1522S

RAY HAYS, ET AL., PLAINTIFFS

versus

EDWIN W. EDWARDS, in his official
capacity as Governor of the State of
Louisiana, ET AL., DEFENDANTS

ORDER

IT IS ORDERED that Plaintiffs' Motion for Judgment as a Matter of Law be and it is hereby GRANTED.

IT IS FURTHER ORDERED that Act 1 of the Second Special Session of the 1994 Louisiana Legislature (the Act) is unconstitutional, in that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and the redistricting plan embodied in the Act is null and void.

IT IS FURTHER ORDERED that the State of Louisiana is permanently enjoined from holding any elections under the Act.

IT IS FURTHER ORDERED that, although we do not invalidate the 1992 congressional elections, the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the plan in Act 42 of 1992 of the State of Louisiana, and each district created under such plan, shall expire, *ipso facto,* at noon on the 3rd day of January, 1995, and such terms of office and such districts shall not be extended or arried over into the next Congress in any manner whatsoever.

IT IS FURTHER ORDERED that a congressional redistricting plan for the State of Louisiana is hereby provided, as set forth in Appendix A, on the basis of which all congressional elections for the seven (7) United States Representatives from the State of Louisiana to the One Hundred Fourth Congress shall be conducted, with the dates for qualifying and for holding such elections to be established by the cognizant officials of the State of Louisiana according to law; and that all subsequent elections of United States Representatives from the State of Louisiana shall be conducted under the plan provided by this court until and unless a congressional districting plan enacted by the State of Louisiana according to law is submitted to this court and is determined by it to be constitutionally valid.

IT IS FURTHER ORDERED that, as prevailing parties in all phases of this case to date, the Plaintiffs are entitled to recover all reasonable costs, attorneys' fees and expenses, including reasonable expert witness fees, pursuant to 42 U.S.C. 1988, in amounts to be determined by reference to United States Magistrate Judge Roy S. Payne for review and recommendations; provided, however, that such determination shall not prevent this Order from becoming final immediately upon its being filed.

This court reserves the right to issue, and intends to issue, a memorandum opinion consistent with this Order.

FOR THE COURT:

/s/ Donald E. Walter
DONALD E. WALTER
District Judge

[Judgment Entered 7-26-94]

LOUISIANA CONGRESSIONAL DISTRICTS

The State of Louisiana is divided into the following seven Congressional Districts:

DISTRICT 1

District 1 is composed of Precincts 3-G, 5-G, 8-G, 9-G, 10-G, 1-H, 2-H, 3-H, 4-H, 5-H, 6-H, 7-H, 8-H, 9-H, 1-K, 2-K, 3-K, 4-K, 5-K, 6-K, 7-K, 8-K, 9-K, 10-K, 11-K, 12-K, 13-KA, 15-K, 16-K, 17-K, 18-K, 19-K, 20-K, 25-K, 27-K, 28-K, 34-K, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132, 134, 135, 136, 137, 170, 171, 174B, 175, 176, 177, 178, 182, 183, 184, 185, 193, 194A, 195, 210, 211, 225, 226, 227, 228, 229, 230, 231, and 234 of Jefferson Parish; Precincts 3-20, 4-8, 4-9, 4-10, 4-10A, 4-11, 4-12, 4-13, 4-13A, 4-14, 4-14A, 4-15, 4-16, 4-16A, 4-17, 4-17A, 4-18, 4-18A, 4-19, 4-20, 4-20A, 4-21, 4-21A, 4-22, 4-23, 5-12, 5-13, 5-14, 5-15, 5-16, 5-17, 5-18, 5-19, 7-33A, 7-40, 7-41, 7-42, 12-4, 13-1, 14-1, 14-2, 14-3, 14-4, 14-8, 14-9, 14-10, 14-11, 16-2, 17-1, 17-17, 17-18, 17-18A, 17-18B, 17-19, 17-19A, 17-20, and 17-21 of Orleans Parish; St. Tammany Parish; Tangipahoa Parish; and Washington Parish.

DISTRICT 2

District 2 is composed of Precincts 1-G, 2-G, 4-G, 6-G, 7-G, 11-G, 13-KB, 14-K, 21-K, 22-K, 23-K, 24-K, 26-K, 29-K, 30-K, 31-K, 32-K, 33-K, 1-W, 2-W, 3-W, 4-W, 5-W, 6-W, 7-W, 8-W, 9-W, 104, 107, 115, 131, 133, 138, 150, 151, 152, 153, 154, 155, 156, 157A, 157B, 172, 173, 174A, 179A, 179B, 180, 181, 186, 187, 188, 189, 190, 191, 192, 194B, 196, 197, 198, 212, 213A, 213B, 213C, 214, 215, 232, 233, 235, 236, 237, 246A, and 246B of Jefferson Parish and Precincts 1-1, 1-2, 1-5, 1-6, 1-7, 2-1, 2-2, 2-3, 2-4, 2-5, 2-6, 2-6A, 2-7, 3-1, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-9, 3-10, 3-12, 3-13, 3-14, 3-15, 3-16, 3-17, 3-18, 3-19, 4-2, 4-3, 4-4, 4-5, 4-6, 4-7, 5-1, 5-2, 5-3, 5-4, 5-5, 5-6, 5-7, 5-8, 5-9, 5-10, 5-11, 6-1, 6-2, 6-4, 6-5, 6-6, 6-7, 6-8, 6-9, 7-1, 7-2, 7-4, 7-4A, 7-5, 7-6, 7-7, 7-8, 7-9, 7-9A, 7-10, 7-11, 7-12, 7-13, 7-14, 7-15, 7-16, 7-17, 7-18, 7-19, 7-20, 7-20A, 7-21, 7-22, 7-23, 7-24, 7-25, 7-25A, 7-26, 7-26A, 7-27, 7-27A, 7-27B, 7-28, 7-28A, 7-29, 7-30, 7-31, 7-32, 7-33, 7-34, 7-35, 7-36, 7-36A, 7-37, 7-37A, 7-38, 7-38A, 7-39, 8-1, 8-2, 8-4, 8-5, 8-6, 8-7, 8-8, 8-9, 8-10, 8-11, 8-12, 8-13, 8-14, 8-15, 8-16, 8-17, 8-18, 8-19, 8-20, 8-21, 8-22, 8-23, 8-24, 8-25, 8-25A, 8-26, 8-26A, 8-27, 8-27A, 8-28, 8-29, 8-30, 9-1, 9-2, 9-3, 9-3A, 9-3B, 9-4, 9-5, 9-5A, 9-6A, 9-6B, 9-6C, 9-6D, 9-6E, 9-6F, 9-7, 9-8, 9-8A, 9-8B, 9-9, 9-10, 9-11, 9-12, 9-13, 9-14, 9-15, 9-16, 9-17, 9-18, 9-19, 9-20, 9-21, 9-22, 9-23, 9-24, 9-25, 9-25A, 9-26, 9-26A, 9-27, 9-28, 9-28A, 9-28B, 9-28C, 9-28D, 9-28E, 9-28F, 9-29, 9-29A, 9-30, 9-30A, 9-31, 9-31A, 9-31B, 9-31C, 9-31D, 9-31E, 9-32, 9-33, 9-33A, 9-34, 9-34A, 9-35, 9-35A, 9-36, 9-36A, 9-36B, 9-36C, 9-37, 9-37A, 9-38, 9-38A, 9-38B, 9-39, 9-39A, 9-39B, 9-40, 9-40A, 9-40B, 9-40C, 9-41, 9-41A, 9-41B, 9-41C, 9-41D, 9-42, 9-42A, 9-42B, 9-42C, 9-42D, 9-42E, 9-43, 9-43A, 9-43B, 9-43C, 9-43D, 9-43E, 9-43F, 9-43G, 9-43H, 9-43I, 9-43J, 9-43K, 9-43L, 9-43M, 9-43N, 9-44, 9-44A, 9-44B, 9-4C, 9-44D, 9-44E, 9-44F, 9-44G, 9-44H, 9-44I, 9-44J, 9-44K, 9-44L, 9-44M, 9-44N, 9-44O, 9-44P, 9-44Q, 9-45, 9-45A, 10-3, 10-4, 10-5, 10-6, 10-7, 10-8, 10-9, 10-10, 10-11, 10-12, 10-13, 10-14, 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7, 11-8, 11-9, 11-10, 11-11, 11-12, 11-13, 11-14, 11-15, 11-16, 11-17, 11-18, 11-19, 12-1, 12-2, 12-3, 12-5, 12-6, 12-7, 12-8, 12-9, 12-10, 12-11, 12-12, 12-13, 12-14, 12-15, 12-16, 12-17, 12-18, 12-19, 12-20, 13-2, 13-3, 13-4, 13-5, 13-6, 13-7, 13-8, 13-9, 13-10, 13-11, 13-12, 13-13, 13-14, 13-14A, 13-15, 13-16, 14-5, 14-6, 14-7, 14-12, 14-13, 14-13A, 14-14, 14-15, 14-16, 14-17, 14-18, 14-18A, 14-19, 14-20, 14-21, 14-22, 14-23, 14-24, 14-24A, 14-25, 14-26, 14-26A, 15-1, 15-2, 15-3, 15-4, 15-5, 15-6, 15-7, 15-8, 15-9, 15-10, 15-11, 15-11A, 15-12, 15-12A, 15-13, 15-13A, 15-13B, 15-14, 15-14A, 15-14B, 15-14C, 15-14D, 15-14E, 15-14F, 15-14G, 15-15, 15-15A, 15-15B, 15-16, 15-17, 15-17A, 15-17B, 15-18, 15-18A, 15-18B, 15-18C, 15-18D, 15-18E, 5-18F, 15-19, 15-19A, 15-19B, 15-19C, 16-1, 16-1A, 16-3, 16-4, 16-5, 16-6, 16-7, 16-8, 16-9, 17-2, 17-3, 17-4, 17-5, 17-6, 17-7, 17-8, 17-9, 17-10, 17-11, 17-12, 17-13, 17-13A, 17-14, 17-15, and 17-16 of Orleans Parish.

DISTRICT 3

District 3 is composed of Precints 13, 14, 15, 16A & 16B, 27A, 27B, 28, 29, 31, 32, 33, 34, 35A, 35B, 36, 37, 40, 41, and 42 of Ascension Parish; Assumption Parish; Iberia Parish; Precinct 1-GI, 1-LA, 1-LB, 2-L, 216, 217, 238, 247, 248, 249, and 250 of Jefferson Parish; Lafourche Parish; Plaquemines Parish; St. Bernard Parish; St. Charles Parish; St. James Parish; St. John the Baptist Parish; Precincts 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, 1-7, 2-1 & 2-3, 2-2, 2-4, 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-9, 4-1, 4-2, 4-3, 4-4, 4-5, 4-6, 5-1, 5-2, 5-3 & 5-4, 6-1, 6-2, 6-3, 6-4, 7-1, 7-2, 7-3, 7-4, 8-1, 8-2, 8-3, 8-4, 9-1, 9-4, and 9-5 of St. Martin Parish; St. Mary Parish; and Terrebonne Parish.

DISTRICT 4

District 4 is composed of Precincts 1-1, 1-3, 1-4, 1-6, 1-7, 2-6-0, 3-1, 4-1, 4-2, 4-3, 5-2, 5-2A*, 5-5, and 5-10 of Allen Parish; Beauregard Parish; Bienville Parish; Bossier Parish; Caddo Parish; Claiborne Parish; De Soto Parish; Natchitoches Parish; Red River Parish; Sabine Parish; Vernon Parish; and Webster Parish.

DISTRICT 5

District 5 is composed of Avoyelles Parish; Caldwell Parish; Catahoula Parish; Concordia Parish; East Carroll Parish; Precincts 1-2, 1-13-0, 1-13-1, 4-1-2R, 4-1-3R, 4-1C, 4-2-0, 4-2-1, 4-3, 4-4, 5-1, 5-2-0, 5-2-1, 5-2-2, 5-3, 5-4C, 5-4R, and 5-5 of Evangeline Parish; Franklin Parish; Grant Parish; Jackson Parish; La Salle Parish; Lincoln Parish; Madison Parish; Morehouse Parish; Ouachita Parish; Rapides Parish; Richland Parish; Tensas Parish; Union Parish; West Carroll Parish; and Will Parish.

DISTRICT 6

District 6 is composed of Precincts 1, 2A & B, 3, 4A, 4B, 5A, 5B, 6, 7A, 8A & 8B, 9, 10A & 10B, 11A & 11B, 12, 21A & 21B, 22A, 22B, and 23 of Ascension

Parish; East Baton Rouge Parish; East Feliciana Parish; Iberville Parish; Livingston Parish; Pointe Coupee Parish; St. Helena Parish; West Baton Rouge Parish; and West Feliciana Parish.

DISTRICT 7

District 7 is composed of Acadia Parish; Precincts 1-2, 1-5, 2-1, 2-2-C, 2-2-O, 2-3, 2-4-C, 2-4-O, 2-5, 2-6-C, 3-2, 5-1, 5-3, 5-3A*, 5-4-C, 5-4-O, 5-4-X*, 5-4-Y*, 5-6, 5-7, 5-8, 5-8A*, 5-9, 5-11, 5-12 and 5-13 of Allen Parish; Calcasieu Parish; Cameron Parish; Precincts 1-1, 1-3, 1-4-0R, 1-4-1R, 1-4C, 1-5-0, 1-5-1, 1-6, 1-7, 1-8-0, 1-8-1, 1-8-2, 1-9-0C, 1-9-1C, 1-9-2-C, 1-9-3C, 1-9R, 1-10-0, 1-10-1, 1-11, 1-12, 1-14, 1-15, 1-16, 1-17-0R, 1-17-1R, 1-17C, 1-18-0C, 1-18-1C, 1-18R, 1-19, 2-1, 2-2, 2-3, 2-4, 2-5, 3-1-0, 3-1-1, 3-2-0, 3-2-1, 3-2-2, 3-3, 3-4, 3-5, 3-6-0, 3-6-1, 3-6-2, 3-7, 3-8, 4-1-0R, and 4-1-1R of Evangeline Parish; Jefferson Davis Parish; Lafayette Parish; St. Landry Parish; Precincts 9-2, and 9-3 of St. Martin Parish; and Vermilion Parish.

The precincts enumerated herein are the precincts existing on April 17, 1994 established by the respective parish governing authority and used by the Louisiana Legislature in Act 1 of the Second Extraordinary Session of 1994.

DB: LA SEN 1994

Congressional District Statistics
Total Population

District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 1	1	602,842	602,853	−11	0.00%
District 2	1	602,877	602,853	24	0.00%
District 3	1	602,839	602,853	−14	0.00%
District 4	1	602,876	602,853	23	0.00%
District 5	1	602,933	602,853	80	0.01%
District 6	1	602,774	602,853	−79	−0.01%
District 7	1	602,832	602,853	−21	0.00%

PLANWIDE STATISTICS:

Range of populations:	602,774 to 602,933
Ratio range:	1.0003
Absolute range:	−79 to 80
Absolute overall range:	159
Relative range:	−0.01 to 0.01%
Relative overall range:	0.03%
Absolute mean deviation:	36.00
Relative mean deviation:	0.01%

DB: LA SEN 1994

Congressional District Summary
Total Population and 1994 Registered Voters

District Name	Total Pop.	Total White	Total Black	Total Reg. Vot.	Reg. Wh.	Total Reg. Blk.
District 1	602,842 100.00%	515,665 85.54%	72,979 12.11%	332,945 100.00%	296,205 88.97%	32,354 9.72%
District 2	602,877 100.00%	215,630 35.77%	365,874 60.69%	292,713 100.00%	110,239 37.66%	176,552 60.32%
District 3	602,839 100.00%	443,616 73.59%	142,167 23.58%	330,048 100.00%	250,432 75.88%	76,915 23.30%
District 4	602,876 100.00%	397,629 65.96%	195,980 32.51%	299,652 100.00%	214,031 71.43%	82,876 27.66%
District 5	602,933 100.00%	410,725 68.12%	187,223 31.05%	333,182 100.00%	239,419 71.86%	92,379 27.73%
District 6	602,774 100.00%	402,995 66.86%	191,421 31.76%	332,407 100.00%	238,560 71.77%	91,507 27.53%
District 7	602,832 100%	452,878 75.13%	143,637 23.83%	336,429 100.00%	258,583 76.86%	76,329 22.69%
Total	4,219,973 100.00%	2,839,138 67.28%	1,299,281 30.79%	2,257,376 100.00%	1,607,469 71.21%	628,912 27.86%

DB: LA SEN 1994

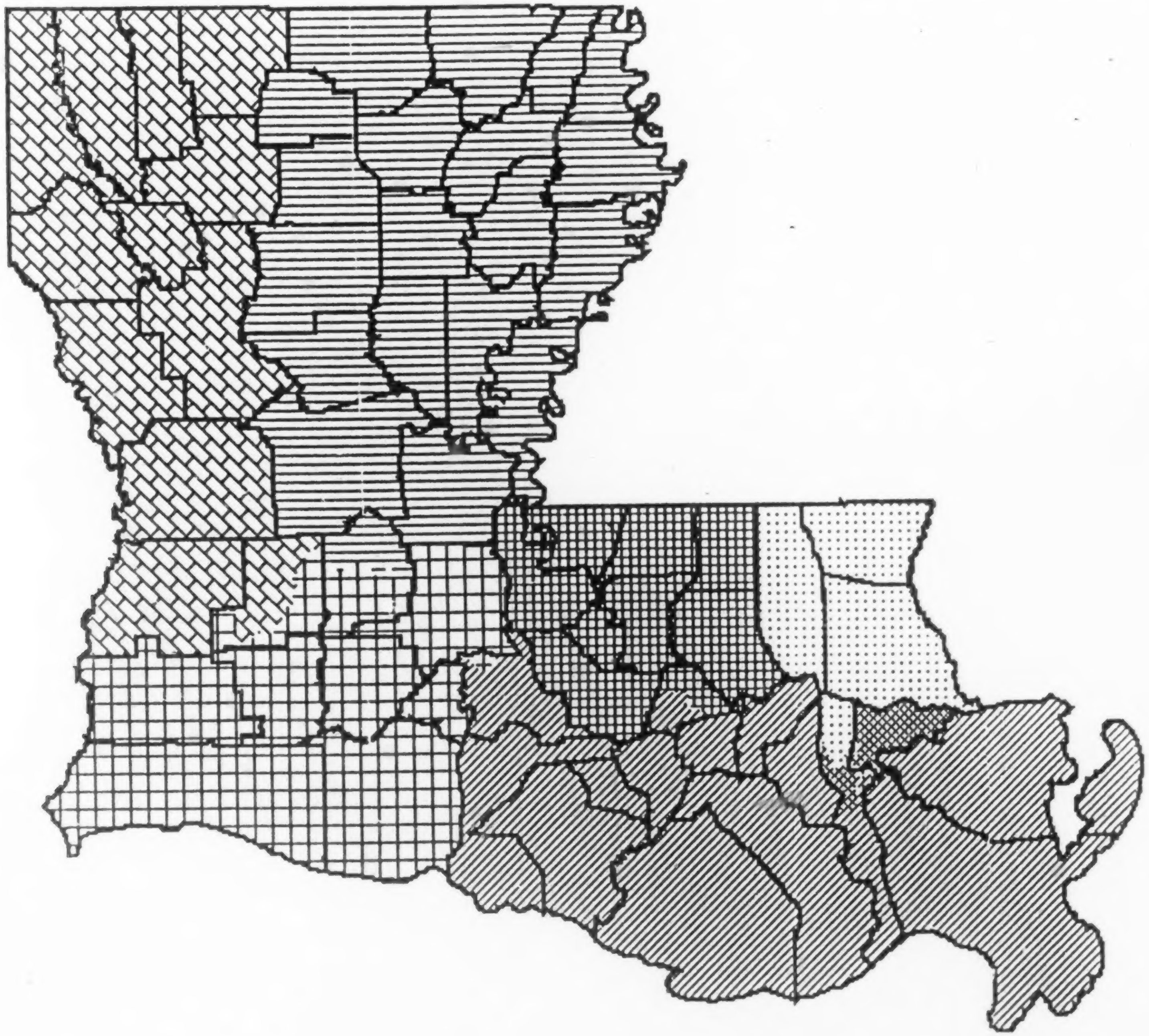
Parish Population by Congressional District
Total Population and 1994 Registered Voters

Census Unit	Total Pop.	Total White	Total Black	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
District 1						
Jefferson Parish	289,679	261,785	16,940	153,838	145,986	5,351
Orleans Parish	39,761	36,804	2,219	26,264	24,516	1,318
St. Tammany Parish	144,508	126,806	15,917	82,209	73,706	7,225
Tangipahoa Parish	85,709	60,601	24,527	45,988	34,015	11,831
Washington Parish	43,185	29,669	13,376	24,646	17,982	6,629
Total District 1	602,842	515,665	72,979	332,945	296,205	32,354
District 2						
Jefferson Parish	145,700	78,880	60,365	63,586	36,331	25,897
Orleans Parish	457,177	136,750	305,509	229,127	73,908	150,655
Total District 2	602,877	215,630	365,874	292,713	110,239	176,552
District 3						
Ascension Parish	21,079	10,831	10,107	13,202	7,186	5,983
Assumption Parish	22,753	15,273	7,349	13,823	9,411	4,410
Iberia Parish	68,297	46,940	20,154	38,442	27,371	10,951
Jefferson Parish	12,927	10,505	1,737	6,940	6,011	737
Lafourche Parish	85,860	72,371	10,703	43,794	39,464	4,243
Plaquemines Parish	25,575	18,522	5,944	14,589	10,454	3,137
St. Bernard Parish	66,631	62,199	3,111	39,195	37,308	1,754
St. Charles Parish	42,437	31,638	10,253	25,533	19,315	6,184

St. James Parish	20,879	10,484	10,357	13,676	7,093	6,567
St. John the Baptist Parish	39,996	25,039	14,419	22,263	13,593	8,580
St. Martin Parish	41,337	27,044	13,664	24,405	16,495	7,850
St. Mary Parish	58,086	37,688	18,337	30,986	21,270	9,508
Terrebonne Parish	96,982	75,082	16,032	43,200	35,461	7,011
Total District 3	602,839	443,616	142,167	330,048	250,432	76,915
District 4						
Allen Parish	7,050	6,049	972	4,794	4,114	663
Beauregard Parish	30,083	25,242	4,489	16,481	14,255	2,125
Bienville Parish	15,979	8,986	6,949	9,883	5,606	4,270
Bossier Parish	86,088	67,030	17,381	39,519	33,037	6,146
Caddo Parish	248,253	146,580	99,511	123,515	81,992	40,524
Claiborne Parish	17,405	9,313	8,041	9,228	5,348	3,871
De Soto Parish	25,346	14,003	11,141	14,403	8,429	5,489
Natchitoches Parish	36,689	22,357	13,779	20,534	13,096	7,146
Red River Parish	9,387	5,752	3,589	5,997	3,848	2,144
Sabine Parish	22,646	17,939	3,984	13,586	11,310	2,206
Vernon Parish	61,961	45,828	12,867	20,275	17,723	2,135
Webster Parish	41,989	28,550	13,277	21,437	15,273	6,157
Total District 4	602,876	397,629	195,980	299,652	214,031	82,876
District 5						
Avoyelles Parish	39,159	28,324	10,585	23,253	17,472	5,729
Caldwell Parish	9,810	7,970	1,760	6,397	5,357	1,031
Catahoula Parish	11,065	8,136	2,874	7,573	5,738	1,822
Concordia Parish	20,828	13,164	7,596	12,063	7,868	4,184
East Carroll Parish	9,709	3,355	6,291	5,774	2,303	3,436
Evangeline Parish	6,405	5,776	613	4,234	3,858	371

Census Unit	Total Pop.	Total White	Total Black	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
Franklin Parish	22,387	15,278	7,040	13,240	9,682	3,549
Grant Parish	17,526	14,860	2,540	10,566	9,015	1,523
Jackson Parish	15,705	11,065	4,589	9,297	6,663	2,620
La Salle Parish	13,662	12,271	1,257	10,185	8,748	1,324
Lincoln Parish	41,745	24,620	16,590	20,477	12,814	7,450
Madison Parish	12,463	4,961	7,415	7,834	3,597	4,207
Morehouse Parish	31,938	18,584	13,263	17,008	10,816	6,178
Ouachita Parish	142,191	96,870	44,096	70,344	51,233	18,890
Rapides Parish	131,556	92,989	36,805	68,931	51,287	17,105
Richland Parish	20,629	13,020	7,539	11,586	7,835	3,726
Tensas Parish	7,103	3,292	3,785	4,503	2,217	2,283
Union Parish	20,690	14,850	5,767	12,816	9,449	3,347
West Carroll Parish	12,093	9,997	2,020	6,808	5,809	986
Winn Parish	16,269	11,343	4,798	10,844	6,129	3,804
Total District 5	602,933	410,725	187,223	333,182	239,419	92,379
District 6						
Ascension Parish	37,135	33,649	3,161	21,626	20,151	1,402
East Baton Rouge Parish	380,105	240,614	132,328	199,491	139,379	58,868
East Feliciana Parish	19,211	10,022	9,083	10,844	6,129	1,804
Iberville Parish	31,049	16,519	14,385	20,020	10,953	9,058
Livingston Parish	70,526	66,269	3,920	40,589	38,303	2,232
Pointe Coupee Parish	22,540	13,196	9,275	14,550	8,899	5,644
St. Helena Parish	9,874	4,725	5,127	7,834	3,831	3,996
West Baton Rouge Parish	19,419	12,329	6,993	11,645	7,473	4,154
West Feliciana Parish	12,915	5,672	7,149	5,808	3,442	2,349
Total District 6	602,774	402,995	191,421	332,407	238,560	91,507

District 7						
Acadia Parish	55,882	45,532	10,179	32,718	26,875	5,817
Allen Parish	14,176	10,259	3,524	8,177	6,126	1,896
Calcasieu Parish	168,134	128,181	38,445	84,484	66,510	17,423
Cameron Parish	9,260	8,685	503	6,125	5,776	342
Evangeline Parish	26,869	18,629	8,088	17,546	12,336	5,193
Jefferson Davis Parish	30,722	24,721	5,836	17,704	14,562	3,116
Lafayette Parish	164,762	125,340	36,846	89,258	70,268	18,467
St. Landry Parish	80,331	47,532	32,392	48,634	28,873	19,638
St. Martin Parish	2,641	1,762	868	1,498	1,021	474
Vermilion Parish	50,055	42,237	6,956	30,285	26,236	3,963
Total District 7	602,832	452,878	143,637	336,429	258,583	76,329



APPENDIX C

[Filed Dec. 28, 1993]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

No. 92-CV-1522

RAY HAYES, ET AL., PLAINTIFFS

versus

STATE OF LOUISIANA, ET AL., DEFENDANTS

Before WIENER, Circuit Judge, SHAW, Chief District Judge, and WALTER, District Judge.

MEMORANDUM OPINION

WIENER, Circuit Judge:

Plaintiffs Ray Hayes, et al. (Plaintiffs) challenge the congressional redistricting plan (the Plan) adopted by the Louisiana State Legislature (the Legislature) when, following the 1990 census, it enacted Act 42 of 1992 (Act 42).[1] In its present pos-

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[1] A technical distinction can be drawn between the terms "apportionment" and "reapportionment," on the one hand, and "districting" and "redistricting" on the other:

> *apportionment* and *reapportionment* involve the allocation [by Congress] of a finite number of representatives

ture, this case considers the constitutionality of the Plan, admittedly designed *inter alia* to increase the number of black representatives in Louisiana's congressional delegation from one out of eight to two out of seven. The Plaintiffs insist that the Plan accomplishes this result by employing impermissible racial gerrymandering to create a new majority-black voting district, thereby violating the Equal Protection Clause of the United States Constitution.

In simplest form, this case poses the question, "Does a state have the *right* to create a racial majority-minority congressional district by racial gerrymandering?" In simplest form, the answer—largely supplied by the United States Supreme Court's opinion in *Shaw v. Reno*[2], rendered during the pendency of this case—is "Yes, but only if the state does it *right*."

Finding that the Plan in general and Louisiana's Congressional District 4 in particular are products of racial gerrymandering and are *not* narrowly tailored to further any compelling governmental interest, we continue that the Legislature did not "do it right." We hold, therefore, that Plaintiffs' right to equal protection as guaranteed by the U.S. Constitution is

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> among a fixed number of pre-established areas. *Districting* and *redistricting* . . . refer to the process by which the lines separating legislative districts are drawn [by states].

See Major v. Treen, 574 F. Supp. 325, 328 (E.D. La. 1983) (quoting Backstrom et al., *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Min. L. Rev. 1121, 1121 n.1 (1978). For simplicitly, however, we use both terms interchangeably.

[2] *Shaw v. Reno*, 508 U.S. ——, 113 S. Ct. ——, 125 L. Ed. 2d 511 (1993).

violated by the Plan. Consequently, we declare Act 42 of 1992 to be unconstitutional and the redistricting plan embodied therein to be null and void; enjoin the State of Louisiana from holding any future congressional elections based on the Plan; and, although we do not invalidate the 1992 congressional elections held thereunder, hold that the term of office of each member of the United States House of Representatives from Louisiana who represent a district created under the Plan shall expire, *ipso facto*, at noon on the 3rd day of January, 1995,[3] such terms of office not to be extended or carried over into the next Congress in any manner whatsoever.

I

STATEMENT OF THE CASE

The Plan comprises five majority-white districts (Districts 1, 3, 5, 6 & 7) and two majority-black districts (Districts 2 and 4).[4] District 2 has a minority voting age population of 56%, while District 4 has a minority voting age population of 63%. New District 2 covers essentially the same geographic area as did old District 2 in the previous plan: almost the entire population of Orleans Parish and roughly one-third of the population of Jefferson Parish. District 2 is not challenged in the instant lawsuit, nor elsewhere to our knowledge. Rather, District 4, appearing for the first time in Act 42, is the primary focus of this constitutional challenge.

Shortly after the enactment of Act 42, the Plaintiffs filed this suit seeking to have 1) the Plan declared unlawful, 2) the Defendants enjoined from using the Plan in the impending congressional elections, 3) the Legislature ordered to create a new plan that would not segregate state residents into voting districts on the basis of race, and 4) the Defendants preliminarily enjoined "from taking any action in preparation for the primary or general elections for the U.S. House of Representatives . . . ." In their complaint the Plaintiffs—who are black, white, and Asian residents of either District 4 or District 6—allege that the Plan violates Section 3 of the Louisiana State Constitution, Section 2 of the Voting Rights Act, and the Fifth, Fourteenth and Fifteenth Amendments of the United States Constitution.

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[3] *See* U.S. Const. amend. XX, § 1.

[4] *See* Table, Appendix A.

As required by the Voting Rights Act, the chief judge of the United States Court of Appeals for the Fifth Judicial Circuit appointed the instant panel to hear this case. It was tried on August 26 and 27, 1992 (the Trial). At the conclusion of the Trial, we issued an interlocutory Memorandum Ruling and Order (the 1992 Order) in which we denied Plaintiffs' request for an injunction, allowed the 1992 Congressional elections to go forward under the Plan, refused to consider Plaintiffs' state and federal constitutional claims, and took Plaintiffs' Voting Rights Act claims under advisement. We also requested post-trial briefing on the question whether the Plan dilutes the voting strength of either blacks or whites in contravention of the Voting Rights Act.

Being aware of an essentially identical case originating in North Carolina—now known as *Shaw v. Reno*—which had progressed further than had the instant case, we held this one under submission until the results of *Shaw* became known. On June 29, 1993, the Supreme Court rendered its decision in

Shaw, profoundly affecting this case and similar ones pending in other states. We requested the parties and invited amici curiae to file supplemental briefs, generally discussing the implications of *Shaw* and specifically addressing whether—in the terminology of *Shaw*—the Plan was "narrowly tailored to further a compelling government interest." In August 1993, we held two additional days of trial (the Evidentiary Hearing) to assist us in determining whether the Plan is in fact the product of racial gerrymandering, and, if so, whether it should nonetheless be sustained because it is narrowly tailored to further a compelling state interest.

II

PRELIMINARY LEGAL MATTERS

A. *Standing*

Early in this case Defendants suggested that the white Plaintiffs intrinsically lack standing to challenge the Plan. The Defendants evidently believe that only historically disadvantaged minorities have standing to attack state laws that separate citizens on the basis of race. But that is not the case.

In *Shaw*, the Supreme Court reaffirmed the important principle "that equal protection analysis is not dependent on the race of those benefited or burdened by a particular classification."[5] "The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: 'No state shall . . . deny to *any person* within its jurisdiction the equal protection of the laws.' The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[6] White citizens thus clearly have standing to challenge redistricting plans under the Equal Protection Clause of the Fourteenth Amendment, just as do black citizens, Hispanic citizens, Asian citizens, Native American citizens, and citizens of any other race. We reject out of hand the implication that, although all are equal under the law, "some . . . are more equal than others."[7]

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[5] *Id.* at 531 (citing *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 494, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (internal quotations omitted).

B. *Survival of Plaintiffs' Equal Protection Claim*

The Defendants assert that the Plaintiffs' equal protection claim does not conform to the structure of the argument approved by the Court in *Shaw* and, consequently, that the Plaintiffs fail to state an equal protection claim under *Shaw*. The Defendants also argue that our 1992 Order, in which we denied Plaintiffs' state and federal constitutional claims, effectively disposed of the Plaintiffs' Equal Protection Clause claim with finality; and that we therefore may only consider the Plaintiffs' claim that the Plan violates the Voting Rights Act. We disagree with both of these assertions.

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[6] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). Indeed, laws that entail overt racial classifications are subject to strict scrutiny, even when they burden or benefit different races equally. *See, e.g., Powers v. Ohio*, 499 U.S. ——, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). "[R]acial classifications do not become legitimate on the assumption that all persons suffer them in equal degree." *Powers*, 113 L. Ed. 2d at 425.

[7] George Orwell, Animal Farm 123 (Penguin Books 1972) (1946).

Although *Shaw* had not yet been decided at the time the Plaintiffs initiated the instant suit, the allegations in the Plaintiffs' complaint are clearly sufficient to make out a cognizable claim of racial gerrymandering under *Shaw*. The narrow holding of *Shaw* is that a citizen states a claim under the Equal Protection Clause by alleging that the reapportionment scheme adopted by his state is so irrational on its face, so bizarrely shaped and convoluted, "that it can only be understood as an effort to segregate voters into separate voting districts because of their race . . . ."[8] There is no question that the Plaintiffs make such allegations in their complaint.

For example, the Plaintiffs allege that "[t]he adoption of Act 42 . . . has resulted in the creation of at least two of seven districts which are devoid of any commonality of interest . . . geographical compactness, contiguousness [sic], consistency with existing political, societal, governmental or economic districts or jurisdictional boundaries, other than the racial designation of the majority therein." Similarly, the plaintiffs allege that "Act 42 created two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota for representation of the State of Louisiana in the United States House of Representatives." And again, Plaintiffs allege that "[t]he defendants enacted and intend to implement Act 42 with the intent to create a Congressional Plan concentrating voters of a particular race in designated districts . . . ." We find that these statements clearly amount to allegations that the State of Louisiana "adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race."[9] We conclude that the Plaintiffs have stated an Equal Protection Clause claim essentially identical to the claim alleged by the plaintiffs in *Shaw*.

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[8] *Shaw*, 125 L. Ed. 2d at 536 (indicating that irregular shapes may imply impermissible racial gerrymandering). *See also id.* at 528-29.

Moreover, our 1992 Order, denying Plaintiffs' state and federal constitution claims, worked a temporary dismissal of Plaintiffs' equal protection claim, not a final one. It was clearly an interlocutory ruling.

In an order dated June 29, 1993 (1993 Order) we requested supplemental briefing to clarify the relevance of *Shaw* to the instant case and to appear at the Evidentiary Hearing to elucidate whether the Plan was "narrowly tailored to further a compelling government interest," as required by the Court in *Shaw*. Of necessity our 1993 Order modified our 1992 Order and reactivated the Plaintiffs'-equal protection claim in light of *Shaw*. As such a resuscitation is specifically contemplated and authorized by Rule 54(b) of the Federal Rules of Civil Procedure,[10] the Plaintiffs' equal protection claim persists and demands adjudication by this court.

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[9] *Shaw*, 125 L. Ed. 2d at 536.

[10] Rule 54(b) of the Federal Rules of Civil Procedure reads in pertinent part: "[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . . and the order . . . is subject to revision at any time before the entry of judgment adjudicating all the claims . . ." Fed. R. Civ. P. 54(b).

III

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As the findings of fact and conclusions of law in this case are inextricably intertwined, we do not present them in separate sections. Such separate presentation would increase the length and redundancy of our discussion. Rather, our language will indicate whether we find a particular observation to be a finding of fact or a conclusion of law. To the extent that a finding of fact is also a conclusion of law, we adopt it as both a finding of fact and a conclusion of law. To the extent that a conclusion of law is also a finding of fact, we also embrace it as both a conclusion of law and a finding of fact.

A. *Racial Gerrymandering: General*

Plaintiffs allege that the Plan is a product of racial gerrymandering. Consequently, as noted above, this case falls squarely within the ambit of *Shaw v. Reno*. In *Shaw*, the Court held that plaintiffs state a justiciable claim under the Equal Protection Clause by alleging that a redistricting scheme is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race . . . ."[11] As *Shaw* was an appeal of the district court's dismissal of the plaintiff's case for failure to state a claim, however, the Court did not have to resolve that claim; it had only to recognize it. Thus, the roadmap sketched by the Court—as helpful as it is—leaves some questions to be answered in cases such as this.

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[11] *Shaw v. Reno*, 125 L. Ed. 2d. at 536.

1. *Racial Gerrymandering Defined*

A legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race.[12] Thus, "racial gerrymandering" refers to the *intentional,* not the accidental, segregation of voters on the basis of race.[13]

2. *Racially Gerrymandered Plans are Subject to Strict Scrutiny*

The bedrock principle underlying the Court's decision in *Shaw* is that racially gerrymandered redistricting plans are subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race.[14] As such, racially gerrymandered plans violate the Equal Protection Clause of the Fourteenth Amendment unless they are narrowly tailored to further a compelling governmental interest.[15]

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[12] *See, e.g., Wright v. Rockefeller,* 376 U.S. 52, 66-67, 84 S. Ct. 603, 11 L. Ed. 2d 512 (1964) (in which the Court examined whether the plaintiffs had sustained their burden of proving "that the New York legislature was either motivated by racial considerations or in fact drew districts on racial lines"). *See also Shaw,* 125 L. Ed. 2d. 511 (in which "racially gerrymandering" and "intentional segregation of voters into separate voting districts" are used interchangeably throughout).

[13] For example, if a legislature devises a redistricting plan that separates river districts from mountain districts, and more blacks happen to live along the rivers, and more whites happen to live in the mountains, then the plan is not a product of racial gerrymandering, even though it entails some coincidental segregation. In short, *de facto* or accidental segregation is not constitutionally suspect, but state-sponsored intentional segregation is, irrespective of the legislature's underlying motives.

Such plans receive "careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." [16] This intense scrutiny is justified by the grave danger that is posed to our constitutional order and national community when a state creates and administers laws based on the race of its citizens.[17]

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[14] *Shaw v. Reno*, 125 L. Ed. 2d 511; *accord City of Mobile v. Bolden*, 446 U.S. 55, 67, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980) (indicating that claims of racial discrimination in the reapportionment context are resolved in the same way as other claims of racial discrimination); *Washington v. Davis*, 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d (1976) (referring to *Wright v. Rockefeller*, 376 U.S. at 58, and pointing out that every member of the Court believed that plaintiffs stated a claim by alleging that "boundaries were purposefully drawn on racial lines"). In its supplemental brief to this court, the United States (which entered this case as amicus curiae) agrees that racially gerrymandered redistricting plans must be strictly scrutinized.

[15] *See Shaw*, 125 L. Ed. 2d at 528.

[16] *Id.* at 527. Thus, even if benign or benevolent motives underlie a legislature's decision to racially gerrymander a redistricting plan, that plan is still subject to strict judicial scrutiny. As discussed below, good motives may allow a plan to survive strict scrutiny, if they rise to the level of a compelling state interest, and if the plan is narrowly tailored to further such an interest. But such motives—however unspotted—do not automatically exempt the plan from what amounts to a presumption of unconstitutionality.

[17] In *Wright v. Rockefeller*, Justice Douglas discusses the dangers of racial gerrymandering. *Wright v. Rockefeller*,

3. *Racial Gerrymandering May be Proved Either Inferentially or Directly*

We have already noted the narrow holding of *Shaw*: a plaintiff may state a claim under the Equal Protection Clause by alleging that the reapportionment scheme adopted by his state is so irrational on its face "that it can only be understood as an effort to segregate voters into separate voting districts because of their race . . . ."[18] *Shaw* primarily deals with the problem of proving racial gerrymandering *indirectly* or *inferentially*. Racial gerrymandering—says the Court in *Shaw*—can be inferred when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose.

But racial gerrymandering may—*a fortiori*—also be proved by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race. If everyone—or nearly everyone—involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be

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376 U.S. 52, 66-67 (Douglas, J., dissenting) ("When racial . . . lines are drawn by the State, the multiracial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan."). In *Shaw*, Justice O'Connor echoes these same concerns. *Shaw*, 125 L. Ed. 2d. at 529 (Redistricting plans that segregate citizens primarily on the basis of race bear "an uncomfortable resemblance to political apartheid.").

[18] *Shaw*, 125 L. Ed. 2d at 536; *see id.* at 528-29 (indicating that irregular shapes may reflect impermissible racial gerrymandering).

found without resorting to the inferential approach approved by the Court in *Shaw*.[19] The Court recognized in *Shaw* that "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."[20] The same is equally true when virtually unanimous, essentially uncontroverted *direct* trial evidence establishes racial classification, as it did here. In this case, we find overwhelming evidence—both *indirect* and *direct*—that the Plan is a product of racial gerrymandering.

4. *Intent Distinguished from Motive*

In a brief aside, we draw on the familiar crime of homicide as a didactic analogy to clarify the important distinction between *intent* and *motive* for purposes of this case. By definition, one who knowingly cocks, aims, and fires a loaded gun at another has the *intent* to kill or cause great bodily harm. That is the *purpose* for shooting. But the shooter may have any number of *motives* for intentionally shooting the victim: to eliminate a romantic rival; to collect insurance proceeds; to avenge some actual or perceived wrong; to repel aggression; to prevent the victim from perpetrating a crime or misdeed; and on and on. The applicable motive is the *goal* sought to be accomplished through the *intentional* killing of the victim.

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[19] *See id.* at 528-29, 536 (regardless of how a racial gerrymander is created, it should receive strict scrutiny); *accord City of Mobile v. Bolden*, 446 U.S. 55, 67, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980).

[20] 125 L. Ed. 2d at 525 (citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)).

We belabor the distinction between intent and motive because it provides a more recognizable way of looking at two separate aspects of this case: 1) the *intent* of the Legislature in creating the Plan on the basis of race (racial gerrymandering); 2) the *motives* of the Legislature or of individual or groups of legislators—whether compelling or not—for engaging in racial gerrymandering. Whatever the *motivations* of the Legislature or of the individual legislators who passed the Plan, the evidence overwhelmingly indicates that the *specific intent* of the Legislature—as an independent, collective organism—was indisputably to enact a plan that included two black and five white majority districts.

At the Evidentiary Hearing so much of the testimony purporting to discuss the intent of the Legislature, or those who sought to influence Louisiana's 1992 redistricting, confounded and confused *intent* or purpose with *motive* or goal. More telling (and more candid) was the testimony at the Trial, a year earlier, concerning the *motive* for creating a second majority-black congressional district. That testimony differed markedly from its counterpart at the Evidentiary Hearing. In both proceedings the testimony on motive was considerably less uniform than was the virtually unanimous testimony regarding the Legislature's *intent* to create a second safe, black majority district. At least by implication, however, four immutable elements provided a common point of departure for all witnesses: 1) Louisiana had an unavoidable legal obligation to reapportion its congressional delegation; 2) reapportionment had to be in strict compliance with the constitutional imperative of one-person, one-vote, meaning that each of Louisiana's seven congressional districts had to contain roughly

603,000 residents; 3) given its failure to adopt a reapportionment plan in 1991, the Legislature would have to adopt a plan in its 1992 session that would be certain to receive immediate preclearance so that the congressional election, scheduled for the fall of that year, could be held; and 4) to obtain timely preclearance, i.e., voluntarily and not by court decree, any plan would have to include two safe, black majority districts.[21]

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[21] Even though the Legislature put itself under severe time constraints by failing to redistrict in 1991, the United States Department of Justice—not a party to this litigation—must be regarded as an active player in this case. As Louisiana is covered by Section 5 of the Voting Rights Act, the Legislature must either (1) have any proposed plan precleared by the Department of Justice, or (2) seek a judgment from the United States District Court for the District of Columbia declaring that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." Voting Rights Act of 1965, 42 U.S.C. § 1973(c). The testimony at the Trial and at the Evidentiary Hearing reflected overwhelmingly that the Attorney General's Office (AGO) had let it be known that preclearance would not be forthcoming for any plan that did not include at least *two* "safe" black districts out of seven. But neither Section 2, nor Section 5 of the Voting Rights Act justifies the AGO's insistence upon two black districts.

To challenge a redistricting plan under Section 2 successfully, plaintiffs who are members of a cognizable racial group must demonstrate that their group is *numerous* enough and *geographically compact* enough to be a majority in a district. *Growe v. Emison*, 507 U.S. ——, 113 S. Ct. ——, 122 L. Ed. 2d 388, 403 (1993) (extending the threshold requirements elaborated in *Thornburg v. Gingles*, 478 U.S. 30, 46-47, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), to single member, as well as multimember, districts). Obviously, however, black voters in District 4 do not constitute a *geographically compact* body as required by *Gingles*. Neither would any district resembling

B. *Shaw v. Reno: Inferential Proof of Racial Gerrymandering*

Shaw deals primarily with proving racial gerrymandering *inferentially*. We proceed to examine the

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District 4 be geographically compact. Consequently, the AGO cannot legitimately claim that Section 2 of the Voting Rights [Act] compels the creation of any redistricting plan that contains a tortured district like District 4. Unless a second geographically compact black majority district is possible, the State's failure to create one does not violate Section 2. *Growe*, 122 L. Ed. 2d at 404. This is not to say that Section 2 forbids the creation of such a plan; simply that Section 2 does not require it. *Voinovich v. Quilter*, 507 U.S. ——, 113 S. Ct. ——, 122 L. Ed. 2d 500, 513-14 (1993). Consequently, the AGO cannot rely on Section 2 of the Voting Rights Act to force a state to adopt a plan containing an additional majority-minority district with a geographically dispersed black majority.

Additionally, Section 2 of the Voting Rights Act expressly states that "[n]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Voting Rights Act of 1965, Section 2, 42 U.S.C. § 1973. Section 2 refuses to transform the individual right to vote into a group right to elect. Thus, Section 2 emphatically does not authorize the AGO to reject plans that fail to "give full effect" to minority voters, or otherwise to create a *de facto* requirement of proportional representation by rejecting all plans that fail to maximize the concentration of minority voters. The text of Section 2 of the Voting Rights Act expressly declares that proportional representation is not required.

Neither can Section 5 of the Voting Rights Act—on the basis of the 1990 Census—justify the AGO's insistence that Louisiana adopt a congressional redistricting plan with two safe, black-majority districts. In *Beer v. United States*, the Supreme Court stated that "the purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of indirect or circumstantial evidence of racial gerrymandering in the instant case.

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racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976) (emphasis added); *accord Shaw*, 125 L. Ed. 2d at 533. In this case, however, a redistricting Plan for the State of Louisiana that provided for one black majority district would have satisfied the requirement of nonretrogression.

As a result of the 1990 Census, Louisiana lost a seat in the United States House of Representatives: previously it had eight seats, now it has seven. Thus, even if the Legislature had adopted a plan with a single black majority district, that plan would have satisfied the Section 5 nonretrogression principle: whereas before black majority districts comprised one-eight of all districts, under a new plan with one black majority district, such districts would constitute one-seventh of all districts, an increase of nearly two percent. Thus, the Section 5 nonretrogression principle does not, on the instant facts, require Louisiana to adopt a redistricting plan with a second black-majority district. Any suggestion by the AGO to the contrary was incorrect.

In summary, neither Section 2 nor Section 5 of the Voting Rights Act justify the AGO's insistence that Louisiana adopt a plan with two safe, black majority districts. Yet members of the Legislature uniformly believed that they needed to create such a redistricting plan to secure preclearance. The letters sent by the Office of the Assistant Attorney General (AAGO) in response to redistricting plans for the Louisiana Senate and the Board of Elementary and Secondary Education (BESE) show how Louisiana legislators got this mistaken impression.

In these letters, the AAGO acknowledged that the plans "appear[ed] to have no retrogressive effect" and met "in large part . . . Section 5 preclearance requirements." Yet the AAGO refused to preclear the plans because—in its apparent judgment—they could have been drawn "in a manner that would more effectively provide to black voters an equal opportunity . . . to elect candidates of their choice," there

1. *The Shifting Evidentiary Burden*

The Court in *Shaw* apparently intended to establish an evidentiary "minuet" for racial gerrymander-

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a euphemism for black candidates. But, again, the Voting Rights Act does not require that a plan be drawn to maximize the efficacy of the black vote, and we perceive the AAGO's insistence upon such a result to be tantamount to an insistence upon proportional representation: an insistence that is expressly forbidden by Section 2 of the Voting Rights Act.

In one letter the AAGO went so far as to suggest *how* the plan should be drawn to secure early preclearance by combining "significant concentrations of black voters in northeastern Louisiana and in the parishes bordering the State of Mississippi, both along the river and the state's southern border." Here—in a nutshell—was a blueprint for the highly irregular district known as District 4: a district that runs through the length and breadth of the State, a district that ignores traditional geographical and political boundaries, yet a district that the AAGO inappropriately hinted would have to be created if Louisiana was to secure preclearance. What was the authority for the AAGO's insistence? The answer presents itself: none.

When State authorities wrote back, explaining the historical, cultural, political, economic, and religious significance of the north-south divide in Louisiana, as a means of explaining and defending its proposed plan, the AAGO dismissed the explanation and concluded that lumping black voters together in a district "transcends the distinction between northern and southern parishes." What was the authority for this judgment: again, none! To reiterate, neither Section 2 nor Section 5 of the Voting Rights Act requires that geographically dispersed black voters be lumped together to maximize the efficacy of their vote. That is nothing more than an AAGO "gloss" on the Voting Rights Act—a gloss unapproved by Congress and unsanctioned by the courts.

The Department of Justice did not conclude that Louisiana's concern with preserving its historic parishes was pretextual; it *decided* that creating black districts trumped traditional redistricting criteria. What was the authority for this policy ing cases analogous to the one established by *McDonnell Douglas v. Green* and *Texas Department of Community Affairs v. Burdine* in the Title VII context.[22] After a citizen establishes a cause of action by

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decision? Yet again, none! As the AAGO concluded that the State BESE plan was not retrogressive with respect to the black vote, it necessarily admitted that the plan had no discriminatory effect. *See Beer v. United States,* 47 L. Ed. 2d 629, 639. Thus, the AAGO could legally reject the plan only if it determined—and presumably for non-arbitrary reasons—that the plan reflected discriminatory motives. *Georgia v. United States,* 411 U.S. 526, 93 S. Ct. 1702, 36 L. Ed. 2d 472 (1973). But the AAGO did not so conclude.

Rather, the AAGO arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies, rather than as a shield to prevent lamentable historical abuses. The Attorney General's Office has no authority to withhold preclearance for reasons outside the ambit of the Voting Rights Act. Indeed, because any plan that entails more racial gerrymandering than is absolutely necessary to pass Voting Rights Act muster is potentially unconstitutional, *Shaw,* 125 L. Ed. 2d at 534, the AGO will risk encouraging unconstitutional conduct if it pressures states to gerrymander their districts to maximize the concentration of minority voters.

[22] *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The three-step McDonnell-Douglas-Burdine "minuet" structures the basic allocation of burdens and order of presentation of proof in the Title VII context. *Burdine,* 450 U.S. at 252-53. This minuet requires (1) the plaintiff to prove—by a preponderance of the evidence—a prima facie case of disparate treatment that contravenes Title VII of the Civil Rights Act of 1964, (2) the defendant to proffer a legitimate, nondiscriminatory reason for the employee's rejection, and (3) the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. *Id.* at 253. At the

alleging that the reapportionment scheme adopted by his state is so irrational on its face that it can only be understood as an effort to segregate voters on the basis of race—thereby creating a presumption of unconstitutionality[23]—the burden shifts to the state to proffer a legitimate, non-racial explanation for the irrationally shaped districts in its plan.[24] If, per chance, the state should answer, generally denying gerrymandering, and move for summary judgment, the plaintiff presumably would need to support such a presumption with summary judgment evidence, e.g., affidavits and depositions demonstrating legislative intent, violation of redistricting principles, or the like. But if the state advances a legitimate, nonracial explanation for the plan's irregularity, then the factfinder must—as always—weigh the evidence on both sides and decide whether the plaintiff has met his burden of demonstrating that the plan's irrational shape reflects racial gerrymandering.[25]

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end of the day, however, the plaintiff has the burden of proving that a violation of Title VII occurred. *See St. Mary's Honor Center v. Hicks,* 509 U.S. ——, 113 S. Ct. ——, 125 L. Ed. 2d 407 (1993).

[23] *Shaw*, 125 L. Ed. 2d at 536; *See also id.* at 528-29 (indicating that irregular shapes may imply impermissible racial gerrymandering).

[24] *Id.*

[25] *See, e.g., Wright,* 376 U.S. 52 (in which the Court held that the plaintiffs had not "sustained their burden of proving that . . . [the plan] . . . segregates eligible voters by race and place of origin in violation of the Equal Protection and Due Process Clauses . . . ."); *accord Whitcomb v. Chavis,* 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971). To clarify this minuet further, if a plaintiff comes into court with a map bearing hideously contorted districts and evidence that

Although the Court in *Shaw* does not discuss the respective burdens borne by the parties in this shifting protocol, Supreme Court precedent clearly indicates that plaintiffs have the ultimate burden of proving—by a preponderance of the evidence—that the irregularity of the challenged districts reflects racial gerrymandering.[26] Proof on the merits would likely focus on the pretext of the state's proffered nondiscriminatory reasons. Nevertheless, placing the burden of proof on the plaintiffs reflects a basic tenet of equal protection analysis: there can be no violation of the Equal Protection Clause unless those who complain demonstrate that the state has engaged in purposeful discrimination.[27] Thus, in this case, Plaintiffs have the burden of demonstrating by a predonderance of the evidence that the Legislature was "motivated by racial considerations" when it

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the state legislature drew those districts on the basis of race, and if the plaintiff complains that those districts lack a nonracial explanation—i.e., cannot be explained or understood without hypothesizing racial gerrymandering—then the plaintiff has stated a prima facie case under *Shaw*. If the state then introduces evidence that tends to show that the legislature was actuated by other motives that can explain the bizarre contours of the districts without resorting to race, the state has created a competing inference. The factfinder must then decide, on the basis of all available evidence, who is right.

[26] *Id.*

[27] *City of Mobile v. Bolden*, 446 U.S. at 66, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980) (citing *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)); Plaintiffs also have the burden of proving the invalidity of a reapportionment plan under Section 2 of the Voting Rights Act. *Voinovich v. Quilter*, 507 U.S. ——, 113 S. Ct. ——, 122 L. Ed. 2d 500, 512 (1993).

adopted Act 42.[28] We find that the plantiffs have met that burden—comfortably.

2. *Plaintiffs' Cause of Action*

In addition to stating a cause of action by alleging extreme irregularity of shape, a plaintiff may, under *Shaw*, strengthen the inference that the state engaged in constitutionally suspect racial gerrymandering by demonstrating the state's disregard of traditional districting principles.[29] As discussed above in section II B, the Plaintiffs have clearly alleged both that the Plan—particularly District 4—is highly irregular on its face, and that the Plan disregards traditional districting principles.[30] We therefore conclude that the Plaintiffs established a cause of action essentially identical to that alleged by the plaintiffs in *Shaw*. It consequently devolved upon the Defendants either to refute the allegations directly or to provide legitimate, non-racial explanations for the Plan's irrational shape and its disregard of traditional districting criteria.[31]

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[28] *Wright,* 376 U.S. at 55.

[29] *Shaw,* 125 L. Ed. 2d at 528.

[30] For example, Plaintiffs allege that "[t]he adoption of Act 42 . . . has resulted in the creation of at least two of seven districts which are devoid of any commonality of interest . . . geographical compactness, contiguousness [sic], consistency with existing political, societal, governmental or economic districts or jurisdictional boundaries, other than the racial designation of the majority therein." *See* discussion in section II B of this Memorandum Opinion for other examples of Plaintiffs' allegations.

[31] Recalling our pedagogic comparison with homicide, when the state attempts to convict a defendant of homicide using

3. *Defendants' Proffered Justifications*

Apparently recognizing the impossibility of directly refuting high irregularity and violation of traditional districting criteria, the Defendants attempted to justify the Plan. During the entire Trial, not one witness ever suggested that the Legislature's *intent* in creating District 4 was anything other than to create a second district with a super-majority of black voters by drawing its boundaries along racial lines. Indeed, most of the testimony of the Defendants' witnesses concerned how numerically large a black majority was needed to ensure the effectiveness of the Plan, which everyone conceded to be a product of racial gerrymandering.

At the Evidentiary Hearing, however, following as it did on the heels of the Supreme Court's decision in *Shaw*, the Defendants—with the benefit of hindsight—attempted to deny the racial gerrymandering that they so candidly proclaimed and avidly defended a year earlier at the Trial. Specifically, the Defendants now suggest that two non-racial factors played key roles in the creation of the Plan: partisan/incumbent politics and socioeconomic commonalities. As discussed in the following section, we find the Defendant's explanations wholly unconvincing and in many respects disingenuous.

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circumstantial evidence—essentially arguing that the facts are consistent with homicide, the defendant may attempt to show that the evidence is consistent with a far more innocent hypothesis: for example, an accident. The Defendants' opportunity to provide legitimate, non-racial explanations for the Plan's irrational shape is analogous.

4. *Choosing Between the Competing Inferences*

Because of the procedural posture of *Shaw*, the Court did not have to go beyond reversing the district court's grant of the defendants' motion to dismiss. Following a full merits trial here, however, we are obliged to decide whether the Plaintiffs have carried their burden of proving—by a preponderance of the evidence—that the Plan's irregularity and its disregard of traditional redistricting principles reflect racial gerrymandering. As we find that the *only sensible* explanation for the Plan's extreme facial irregularity and is flagrant deviation from traditional districting criteria is that the Legislature intentionally segregated voters into congressional districts based on their race, we conclude that the Plaintiffs have overwhelmingly satisfied their burden of proving racial gerrymandering.

a. *Plaintiffs' Inferential Evidence*

1. *The Plan is Highly Irregular*

The most cursory inspection of the districts established by Act 42 reveals several of them to be irregular, and District 4 to be highly irregular.[32] Like the fictional swordsman Zorro, when making his signature mark, District 4 slashes a giant but somewhat shaky "Z" across the state, as it cuts a swath through much of Louisiana.[33] It begins north of Shreveport—in the northwestern corner of Louisiana, just east of the Texas border and flush against the Arkansas border—and sweeps east along that border, periodically extending pseudopods southward to engulf small pockets of black voters, all the way to the Mississippi River. The district then turns south and meanders down the west bank of the Mississippi River in a narrow band, gobbling up more and more black voters as it goes. As it nears Baton Rouge, the district juts abruptly east to swallow predominantly black portions of several more parishes. Simultaneously, it hooks in a northwesterly arc, appropriating still more black voters on its way to Alexandria, where it selectively includes only predominantly black residential neighborhoods. Finally, at its southern extremity, the district extends yet another projection—this one westward towards Lafayette—adding still more concentrations of black residents. On the basis of District 4's physiognomy alone, the Plan is thus highly irregular, suggesting strongly that the Legislature engaged in racial gerrymandering.[34]

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[32] *See* Map, Appendix B.

[33] *Id.*

2. *The Plan Violates Traditional Redistricting Principles*

In *Shaw*, the Court reiterates the notion that states are not constitutionally *required* to adhere to the traditional redistricting principle of compactness, contiguity, respect for established political subdivisions, and commonality of interests.[35] The Court also observes that a state's *adherence* to traditional districting criteria "may serve to defeat a claim that a district has been gerrymandering on racial lines." [36] Yet a state's *disregard* of such criteria, emphasizes the *Shaw* opinion, may be evidence of constitutionally-suspect racial gerrymandering.[37]

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[34] *See generally Shaw*, 125 L. Ed. 2d 511.

[35] *Shaw*, 125 L. Ed. 2d at 528-29 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752, n.18, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973)). The seminal case of *Major v. Treen* also discusses these traditional redistricting criteria and applies them to the Louisiana context. *Major v. Treen*, 524 F. Supp. 325 (E.D. La. 1983).

Indeed, the Court in *Shaw* refers to a situation "in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles . . ." as a circumstance in which racial gerrymandering can be easily inferred, precisely because the state ignored such principles.[38] As a state's decision to disregard traditional redistricting criteria is probative of constitutionally-suspect racial gerrymandering, we closely examine the Plan's adherence (or, more accurately, non-adherence) to those principles; and we find that, for the most part, the Plan cavalierly disregards them.

a. *Compactness*

District 4 snakes narrowly across Louisiana soil from end to end for more than 600 miles.[39] A rectangle superimposed on the Z-shaped figure formed by District 4 would overlay two-thirds of the State. Additionally, at it winds along its erratic path, District 4 projects myriad diverticulae to encapsulate small sacs of otherwise widely dispersed black voters.

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[36] *Id.* at 529 (citing *Kardner v. Daggett,* 462 U.S. 725, 755, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983).

[37] *Id.* at 528.

[38] *Id.*

[39] *See* Map, Appendix B.

No one could claim that District 4 is compact, at least not with a straight face.

b. *Contინguity*

District 4 was confected to satisfy the traditional districting criterion of contiguity, but only hypertechnically and thus cynically. When displayed on a map of the State, the district's boundaries seem several times to narrow to a single point. This impression reflects reality, for at some places along its attenuated path, District 4 is no more than 80 feet wide. Such tokenism mocks the traditional criterion of contiguity.[40]

c. *Respect For Political Subdivisions*

As one witness explained at the Evidentiary Hearing, there is no more fundamental unit of societal organization in the history of Louisiana than the parish.[41] Whereas the previous congressional plan divided only seven of modern Louisian's 64 parishes, scattering fractions of the same parish in more than one congressional ditsrict, Act 42 splits and scatters 28. District 4 is particularly aggressive in violating the boundaries of these traditional political and governmental units of the State: of the 28 parishes touched by District 4, only four whole parishes are included; but the district annexes only shards of 24 additional parishes, usually incorporating none but the predominantly black fragments of those shattered regions. Additionally, for the first time in Louisiana history, with the advent of Act 42 a districting plan violates the boundaries of nearly all major municipalities in the State. With the exception of Lake Charles, the Plan fragments all major municipalities into more than one congressional district, thereby destroying the common representation historically enjoyed by residents of the same municipality.[42]

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[40] In complementary fashion, District 6 maintains contiguity only by employing gossamer connections at several junctions.

[41] A parish is analogous to a county, but it has its roots in, and takes its name from, the ministrations of the Catholic Church in early Louisiana history.

d. *Commonality of Interests*

Within its irregular boundaries, District 4 subsumes bits of every religious, ethnic, economic, social, and topographical type found in Louisiana.

(i) *Religion and Ethnicity*

District 4 violates the traditional north-south ethnoreligious division of the State. Along its circuitous route, this new district combines English-Scotch-Irish, mainline Protestants, traditional rural black Protestants, South Louisiana black Catholics, Continental French-Spanish-German Roman Catholics, sui generic Creoles, and thoroughly mixed polyglots, each from an historically discrete and distinctive region of Louisiana, as never heretofore so extensively agglomerated.

(ii) *Economic Base*

Cotton and soybean plantations, centers of petrochemical production, urban manufacturing complexes, timberlands, saw mills and paper mills, river barge

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[42] Disregarding New Orleans, which comprises the majority of District 2, the major municipalities of Shreveport, Baton Rouge, Lafayette, Monroe, Alexandria, and Ruston are all rent asunder in this manner.

depots, and rice and sugarcane fields are strung together to form the eclectic and incoherent industrial base of District 4. These diverse segments of the State economy have little in common. Indeed, their interests more often conflict than harmonize.

(iii) *Geography and Topography*

Red clay hills and pinelands, hardwood bottomlands and forests, alluvial floodlands, coastal plains, marshes, swamps and wetlands—all are present in District 4, which—as noted above—stretches more than half a thousand miles from end to end. What did the Legislature intend when it created District 4—this non-traditional, little-in-common "un-district"? The indirect evidence overwhelmingly indicates that the Legislature specifically intended to create a plan with at least two majority black districts. Given the pre-existence of District 2, we find beyond cavil that the Legislature accomplished this by parceling voters into the remaining six districts on the basis of race.

b. *Defendants' Counter-Proof*

In contrast, we have been shown no credible evidence supporting the defense witnesses' proffered motivations of party and incumbency protection and socioeconomic commonality. Their explanations ring hollow. We find them to be no more than disingenuous, *post hoc* rationalizations.

In particular, we find that neither partisan nor incumbency politics was a significant factor in the core decision intentionally to create a plan containing a second black majority district. At the trial, the Defendants never suggested that partisan or incumbent politics played a role in the determination to create

District 4.[43] Indeed, Defendants' counsel objected to Plaintiffs' counsel's questions aimed at eliciting testimony about the Black Caucus-Republican Caucus alliance that supported Act 42, arguing that such testimony was political and therefore irrelevant to the case. Moreover, even though party and incumbency protection play some role—large or small—in virtually everything done in the legislative branches (and executive branches, for that matter) of our contemporary governments, this universal truism does not negate the compelling inference that Act 42 in general, and District 4 in particular, are products of racial gerrymandering. Additionally, without for a moment granting that incumbency politics played a significant role in the decision to create a second majority black district, we question whether the Defendants could prevail in this litigation even if it had.

The Defendants seem to believe that they can defeat a claim of racial gerrymandering under *Shaw* if *any* factor other than race played *any* cognizable role in the creation of a challenged redistricting plan. Although we need not correct such a misconstruction of *Shaw* to find racial gerrymandering in this case, we briefly address this legal issue—*obiter dictum*—in hopes of shedding a little additional light on this difficult area of the law.

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[43] At the Evidentiary Hearing, Defendants introduced evidence of the role of incumbency, but it proved irrelevant to the issue of intentional segregation of voters by race. Such evidence showed, at most, that incumbency affected only the general location of the gerrymander that is District 4, i.e., the effective efforts of Congressional incumbents in "pushing" the pre-ordained second black majority district generally as far north and east as possible. Thus it follows largely the northern boundary of Louisiana with Arkansas and the eastern boundary of Louisiana, i.e., the Mississippi River. But, as Louisiana had already lost one of its eight seats in the House of Representatives, creating a game of incumbents' "musical chairs," none should be surprised by the interesting but irrelevant fact that, once the decision to create a second minority-majority district had been made, each incumbent did what he could to keep his traditional geographical base and see that the new district was located anywhere but in his.

The Defendants evidently base their belief—that the presence of any non-racial motivating factor will excuse racial gerrymandering—on language found at the end of the *Shaw* opinion. There the Court indicates that a plaintiff *states a claim* under the Equal Protection Clause by alleging that a reapportionment plan is so irrational on its face "that it can be understood *only* as an effort to segregate voters . . . ."[44] This emphatically does not mean that if any other factor influenced the legislature the plaintiff is unable to establish a racial gerrymander. Rather, it means that if the contours and content of a redistricting plan *can* be wholly explained to be the product of one or more factors other than race, then the defendants have created a competing inference. The court must then weigh the competing inferences—as indeed it usually must—to decide whether the plaintiff has proved his inference by a preponderance of the evidence.[45] Thus, accurately stated, the question posed by *Shaw* is whether a redistricting plan can be reasonably conceived as the product of non-racial factors. In this case the Plan cannot.[46]

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[44] *Shaw*, 125 L. Ed. 2d at 536 (emphasis added).

[45] *Wright v. Rockefeller*, 376 U.S. 52, 57, 84 S. Ct. 603, 11 L. Ed. 2d (1964).

[46] At the risk of flaying a dead horse, we point out that logic demands that the Defendants' reading of *Shaw* be re-

No one claims that the contours of District 4 can be wholly and alternatively explained as a product of partisan or incumbency politics. Every single witness who addressed the issue either proclaimed or acknowledged that the creation of a second black majority district was the primary factor—or at least a substantial and important factor—in the creation of the Plan. We agree. There is no way that a rational factfinder—looking at the map and reviewing the *credible* evidence with care—could conclude that Act 42 can be explained entirely without reference to racial gerrymandering.

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jected. Suppose a state legislature came right out and admitted that it racially gerrymandered districts in a reapportionment plan, thereby obviating the plaintiff's need to show racial gerrymandering inferentially. Could the state then say, "but we also drew a few district lines to protect incumbents, or to follow a river, or to put a state wildlife park in the district of a congressman who likes migratory birds," and thereby defeat plaintiff's claim beacuse race *was not the only factor* involved in the delineation of districts? Race will never be literally the only factor. So *Shaw* requires only that race be an important factor. If the plaintiff's evidence shows that the plan cannot be understood without postulating that the legislature was significantly actuated by racial motives, then the plaintiff has made out a case of racial gerrymandering.

The cases of *Wright v. Rockefeller* and *Arlington Heights v. Metropolitan Hous. Dev. Corp.* support this interpretation. In *Wright* every member of the court accepted that the plaintiffs stated a claim by alleging that the "New York Legislature was *either motivated by racial considerations*, or in fact drew the districts on racial lines." 376 U.S. at 54. Similarly, the Court in *Arlington Heights* noted that invidious discriminatory intent need not be the legislature's dominant purpose: proof that such discriminatory intent was "a motivating factor" in the legislation is sufficient. 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

At the Evidentiary Hearing, Dr. Alan Lichtman, an expert witness for the Defendants, opined that District 4—which appears so violative of traditional redistricting principles—actually possesses socioeconomic commonality and coherence. Dr. Lichtman contended that District 4 was distinguishable from other districts because its residents were relatively poor, relatively under-educated, and owned fewer telephones and automobiles than did the residents of other districts established by the Plan. The Defendants offered this evidence to suggest "a rational basis [for District 4] other than race."[47] We do not gainsay the conclusions of this witness, but we disagree that they have significance.

Any able statistician who looks at enough statistical characteristics (multivariate analysis) can find something distinctive about any district. In this case District 4 was found to be fairly poor, although poverty is not particularly distinctive in any region of Louisiana. Had District 4 been a fairly wealthy district, the Defendants' expert could have opined that the citizens of District 4 shared the common interest of wealth. And had District 4 fallen right in the middle, he could have explained that District 4 was distinctive in being the most solidly middle class. But all these observations are irrelevant because we find them to rise to no level higher than *post hoc* rationalization.[48]

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[47] The Defendants also offered this evidence to argue (1) that Act 42 served a compelling state interest by enhancing the representation for poor people—especially poor black people—and (2) that the Plan adhered to the traditional redistricting principle of "commonality of interests" and thus was narrowly tailored.

The Defendants admit that the socioeconomic profiles of the Plan's districts were not *actually* used by the Legislature: the census data used in Defendants' statistical analyses were not even available to the Legislature when it passed Act 42. More specifically, freshman Louisiana State Senator Tom Greene testified that no socioeconomic data was submitted with the various redistricting plans when they were considered by the Legislature. Thus, the allegedly distinctive socioeconomic profile of District 4 is factually unconvincing, methodologically flawed, irrelevant, and unquestionably a hindsight rationalization of a plan that everyone understands to have been principally designed to create two majority-black districts. More simply, the socioeconomic profile of District 4 is an *effect* of District 4's design, not a *cause.*

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[48] An additional criticism of Mr. Lichtman's statistical legerdemain is that the socioeconomic characteristics he analyzes are themselves strongly correlated with race, a classic chicken-or-egg fallacy. At this moment in history black people in the South (and generally in America) are—on the average—poorer and less well-educated than their white counterparts. Moreover, blacks in largely segregated communities are probably poorer—on the average—than blacks in more integrated communities. Consequently, racially gerrymandered plans, which seek to draw boundaries around various concentrations of black persons, will inevitably tend to concentrate the poorer, less well-educated blacks.

The Defendants' conclusions therefore have a tautological quality: to prove that factors other than race can explain District 4, the Defendants analyze socioeconomic factors that correlate strongly with race. Of course District 4 is relatively poor and relatively uneducated: it was intentionally filled with relatively poor and uneducated minorities. To use statistical parlance, Dr. Lichtman's conclusions are *spurious*: they tell us nothing that we could not have predicted based on the Legislature's decision to pack District 4 with black voters. For a more scientific discussion of such *spurious correlations*, see Hubert M. Blalock, Jr., *Social Statistics* 443-48 (McGraw-Hill 1972).

We see, then, that the Defendants' proffer of protection of incumbent politicians and distinctive socioeconomic profiles as alternative explanations for the peculiar contours of the Plan simply do not ring true. Faced with competing inferences, this court—as fact finder—must determine the credibility of witnesses, weigh the evidence, and choose between those inferences.[49] Concluding that the facts and inferences overwhelmingly favor the Plaintiffs, we find that the Plan is undeniably a child of racial gerrymandering.[50] Defendants must therefore demonstrate that Act 42 is narrowly tailored to satisfy a compelling state interest, as required by *Shaw* and other applicable Equal Protection Clause cases.[51]

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[49] *Wright v. Rockefeller,* 376 U.S. 52, 57, 84 S. Ct. 603, 11 L. Ed. 2d (1964).

[50] In finding that racial gerrymandering exists in this case, we feel confident that we are faithfully following the Supreme Court's temper in *Shaw.* In that case, the Court gives two examples of fact patterns in which proving racial gerrymandering "will not be difficult at all." *Shaw,* 125 L. Ed. 2d at 528. One example is when "a State concentrate[s] a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for subdivisions." *Id.* Those facts squarely conform to this case. In the instant case, the Louisiana State Legislature created a serpentine belt 600 miles long to engulf enough blacks (actually, more than enough) to create a single super-majority district. According to the Court, this case presents a textbook example of racial gerrymandering that can be easily proved by application of the *Shaw* inferential minuet.

C. *Direct Proof of Racial Gerrymandering*

We need not even consider the kind of indirect or inferential proof approbated in *Shaw* to reach the same point—a finding of racial gerrymandering. In this case, we also reach that junction when we consider the great weight of the *direct* evidence elicited at both the Trial and the Evidentiary Hearing.[52] Regardless of whether we reach a finding of racial gerrymandering by the inferential approach elaborated in *Shaw*, or by direct testimony and documentary evidence, the Defendants have the burden of justifying that gerrymandering.

In this case, direct evidence clearly and forcefully demonstrates that the Plan is a product of racial gerrymandering. Virtually every witness who testified at the Trial (all without the benefit of a retrospective, self-serving view of *Shaw*) either affirmatively stated or accepted as gospel that the Plan was drawn with the *specific intent* of ensuring the creation of a second, safe, black majority congressional district: namely, District 4. The Defendants' witnesses either stated or conceded that the districts created by Act 42 were racially gerrymandered. Indeed, those witnesses, both lay and expert, spent most of their time at the Trial discussing how large the percentage of registered black voters needed to be in the new majority black district to guarantee the efficacy of their racial gerrymander—an efficacy they viewed as the *sine qua non* of preclearance.

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[51] *Shaw*, 125 L. Ed. 2d at 528; *see also supra* note 13.

[52] *See Shaw*, 125 L. Ed. 2d at 528 (implying that however a racial gerrymander is established, it should receive strict scrutiny). *See also supra* note 17 and accompanying text.

In response to this court's query whether the Legislature had created a racial gerrymander, Defendants' counsel—Mr. Mongrue—said, "[a]nd [racial gerrymandering]'s exactly what [the Legislature] can do . . . ." Similarly, Mr. Willie Hunter, a black state legislator and a fact witness for the Defendants, testified that the Legislature's *intention* "was to create a district where there was an excellent possibility of having another black elected . . . , and that to accomplish this they [the legislators] "looked at numbers [of black voters] period." Professor Engstrom, an expert witness for the defense, stated unabashedly that "race drove . . . [the creation of] . . . the Districts."

Not surprisingly, the Plaintiffs' witnesses were at least equally convinced that considerations of race motivated the creation of Act 42. State Representative Adley, a white legislator from Northwest Louisiana, testified that "the only issue presented to us was a racial issue" and stated that District 4 was created "for the sole purpose of making sure that an additional black district got created regardless of what it looked like and what parishes it ran through . . ." Dr. Gary Stokley agreed that "this plan is [based on] race."

At the more recent Evidentiary Hearing, however, the Defendants attempted to recast their arguments in light of *Shaw* and to gainsay the racial gerrymandering that they so readily approbated during the pre-*Shaw* Trial. But even at this latter hearing the witnesses agreed that race was the overarching factor that drove the actual creation of the Plan, and that the Legislature had specifically intended to as-sort voters into districts based on race. Senator Marc Morial, a black legislator from New Orleans who appeared on behalf of the Defendants, testified that "[i]t was the intent of the Legislature to create . . . [a] . . . second majority black district." This is perhaps the clearest, most direct post-*Shaw* statement of intent, and the best illustration of the difference between *intent* and *motive*. Similarly, United States Congressman James A. Hayes (D. La) stated that the politics of race "was the major element" that drove the creation of the Fourth District. Dr. Lawrence N. Powell, one of Defendants' expert witnesses, agreed that "the primary determinant" of the shapes of Districts 2 and 4 was race.

During four full days of testimony, two in 1992 and two more in 1993, some witnesses stated that race was the only factor, while others said that race was the primary factor. One witness—apparently uncomfortable with saying race was the primary factor—admitted that race was a very important factor. Not one witness, Plaintiffs' or Defendants', testified that Act 42 was not largely a product of racial gerrymandering—not one.

Harking back to our homicide analogy, we note that although witnesses at the Evidentiary Hearing voiced various altruistic *motives*—or accused others of various ulterior *motives*—for intentionally employing racial gerrymandering to create voting districts on the basis of race,[53] everyone agreed that the *intent* of the Legislature—analyzed as a whole rather than from the point of view of its constituent members or caucuses—was to create a redistricting plan with a second majority black district.

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[53] Among the positive goals thus voiced were promoting racial harmony, increasing racial fairness, eradicating vestiges of past de jure segregation, and "obeying the law" in the sense of complying with the Voting Rights Act in a way that would justify preclearance, to name a few.

The evidence showed that the Plan passed the Legislature by virtue of an uncommon alliance of legislators: Some who supported the Plan wanted a second super-majority black district to increase the number of black representatives in Louisiana's congressional delegation. Other supporters of the Plan perceived various benefits in the correlative whitening of some districts that attends the intentional segregation of black voters into other adjacent districs.[54] But there is absolutely no doubt that the immediate *intent* of the Legislature as a whole was to enact a plan containing two black majority districts, essentially without regard to any other considerations and interests.

Viewed in any light, the direct evidence in this case proves the presence of racial gerrymandering. Thus, even in the event that we may have somehow misconstrued the Court's opinion in *Shaw*, or misapplied the inferential minuet established therein, the *direct evidence* that Act 42 was a product of racial gerrymandering is overwhelming. Two independent evidentiary bases (inferential and direct) thus support our finding that Act 42 reflects racial gerrymandering. Each is sufficient on its own to subject Act 42 to strict scrutiny, and each is consequently sufficient to require the Defendants to demonstrate that Act 42 is "narrowly tailored to further a compelling governmental interest," as required by *Shaw* and other applicable Equal Protection Clause precedents.[55]

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[54] Testimony at the trial revealed that Act 42 was passed by a legislative alliance between the Black and the Republican Caucuses, historically uncommon bedfellows but, according to expert testimony, a phenomenon occurring with increasing frequency across the country.

D. *Strict Scrutiny of the Plan*

Again, the core principle underlying the Supreme Court's decision in *Shaw* is that racially gerrymandered redistricting plans are subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race.[56] To survive such scrutiny, racially gerrymandered redistricting plans must be narrowly tailored to further a compelling governmental interest.[57]

1. *Compelling Governmental Interest*

Defendants advance four possible compelling state interests to justify their racial gerrymandering: (1) conformity with Section 2 of the Voting Rights Act, (2) conformity with Section 5 of the Voting Rights Act, (3) proportional representation of Louisiana blacks in Congress,[58] and (4) remedying the effects of past racial discrimination. Witnesses also made oblique references to various other admirable but nebulous—and often question-begging—motives, like promoting racial harmony and ensuring fairness. As we conclude, however, that Act 42 is not narrowly tailored to further these or any other compelling state interests, we need not decide here whether any one or more of them—properly clarified—is such an interest. For the sake of judicial economy, then, we do not analyze them in detail. Rather, we assume —without granting—that one or all of them constitutes a compelling state interest.

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[55] *Shaw,* 125 L. Ed. 2d at 528.

[56] *See supra* note 13.

[57] *Shaw,* 125 L. Ed. 2d at 528.

[58] At the Trial, Legislator Willie Hunter strongly advocated a second black majority district for the expressed goal of achieving black proportionality in congress. Without commenting—one way or another—on proportional representation's viability as a "compelling governmental interest," we foresee serious constitutional problems in accomplishing that goal through creation of a second black majority district. Evidence adduced here demonstrates that, of Louisiana black

2. *Narrowly Tailored*

By thus assuming—again, without granting—that the Defendants have articulated one or more compelling state interests that the Plan might further, ~~we~~ have shifted the focus of our strict scrutiny to the final aspect of *Shaw*: whether the Plan is narrowly tailored. In our final illustrative comparison with homicide, we note the parallelism between the hypothetical criminal defendant's burden—*at common law* —of establishing an affirmative defense—such as justifiable homicide—and the State's burden here of establishing the affirmative justification of a compel-

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voting age population outside New Orleans, even the overloaded 63% black District 4 would produce the election of the [black] candidate of choice of fewer than 40% of those blacks whom the proponents of proportional representation want to be thus represented in Congress. Consequently, the Plan would constitute state action that, in effect, grants voting "proxies" *from* the black voters residing in Districts 1, 3, 5, 6 and 7 *to* the black voters of District 4—clearly a disenfranchisement implicating equal protection and possibly due process as well.

ling state interest.[59] But even such affirmative defenses contain crucial limiting elements: the requirement of applying only reasonable force in the self-defense context, and the requirement of narrow tailoring in the compelling state interest context.

A homicide defendent, relying for acquittal on self-defense or justifiable homicide, must show not only that he had a reasonable fear of imminent harm from the aggressor/victim, but also that he used no more force than was reasonably necessary under the circumstances. If a single, deterrent gunshot to the aggressor/victim's leg happens to cause death from uncontrollable hemorrhaging, the homicide may well be justified; but if the defendant fires two or three or four additional, immediately-fatal shots into vital areas of that same aggressor/victim's body after he has been neutralized by the first shot in the leg, the defendant is likely to find that the affirmative defense is unavailing.

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[59] We realize that many states choose to make the absence of justification an element of the *actus reus*, thereby imposing upon the prosecution the burden of proving that the criminal defendant did *not* act in self-defense. As the Supreme Court has lately declined to review whether the Due Process Clause requires the burden of persuasion in self-defense cases to be placed on the prosecution, *see, e.g.*, *Moran v. Ohio*, 469 U.S. 948, 105 S. Ct. 350, 83 L. Ed. 2d 285 (1984) (Brennan, J., dissenting), state legislatures remain free to allocate burdens of proof "by labeling as affirmative defenses" aspects of a case that could alternatively be considered elements of a crime. *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); *see also McElroy v. Holloway*, 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398, 399-400 (Rehnquist, J., dissenting). For our purposes, however, such subtleties are irrevelant: as noted above, we are merely using classic common law homicide/self-defense as an instructive analogy.

In close parallel, *Shaw* tells us that, even in retrogression cases under Section 5, the State does not have carte blanche to engage in racial gerrymandering; its reapportionment plan must *not* go "beyond what [is] reasonably necessary" to further the compelling governmental interest.[60] That is the essence of narrow tailoring in the redistricting context: just as a homicide defendant may not use excessive force to stop an aggressor, neither may a state burden the rights and interests of its citizens more than is reasonably necessary to further the compelling governmental interest advanced by the state.

In this case, uncontroverted evidence from both the Trial and the Evidentiary Hearing convinces us that the Plan is not narrowly tailored to satisfy any of the supposedly compelling state interests advanced by the Defendants.[61] We reach that conclusion first because the Plan entails considerably more segregation than is necessary to satisfy the need for a second black majority district—even assuming arguendo that such a second district were itself justified—and second because the Plan excessively burdens a variety of third party interests—dramatically so.

In its *Shaw* opinion, the Supreme Court provides one example to illustrate how to apply the requirement that a racially gerrymandered plan be *narrowly tailored* to satisfy one or more compelling state interests: "A reapportionment plan would not be narrowly tailored to avoiding the goal of retrogression if the state went beyond what was reasonably necessary to avoid retrogression."[62] Thus, if providing a single majority-minority district satisfies the nonretrogression requirement imposed by Section 5 of the Voting Rights Act,[63] then a racially gerrymandered redistricting plan comprising more than one minority-majority district is not narrowly tailored to satisfy the compelling state interest of comporting with Section 5.[64] Stated more broadly, as voters have an equal protection right not to be segregated by their state legislatures or local governments into various voting districts on the basis of race, only a plan that segregates to no greater extent than is reasonably necessary to further a compelling governmental interest can survive constitutional scrutiny. The same can be said for a plan that supersaturates a majority-minority district, while concomitantly depleting adjacent majority-majority districts of minority voters.

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[60] *Shaw*, 125 L. Ed. 2d at 534.

[61] As noted above, in this section we assume—arguendo—that the State has demonstrated a compelling state interest, although, in fact, we have not so found. Neither could we on the evidence here presented. That is a judgment for the Legislature to make and the courts to review.

In this case, we find that the Plan entails more constitutionally suspect segregation than necessary, and is therefore not narrowly tailored. Continuing to assume arguendo that some state interest had been identified which could justify the creation of a second black-majority district, this Plan would have to be rejected as insufficiently narrowly tailored. It packs more black voters into a District 4 than are reasonably necessary to give blacks a realistic chance to determine the outcome of elections there, providing that they exercise their right to vote. Also, the boundaries of the district violate traditional districting principles to a substantially greater extent than is reasonably necessary.

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[62] *Shaw,* 125 L. Ed. 2d at 534.

[63] *Beer v. United States,* 425 U.S. 130, 141 (interpreting Section 5 as prohibiting voting-procedure changes that "lead to a retrogression in the position of racial minorities . . . .").

[64] The Court's example clearly indicates that the State of Louisiana may not justify the Plan, or any other racially gerrymandered plan with more than one black majority district, by reference to the need to comply with the Section 5 nonretrogression principle. As noted above, because Louisiana lost a seat in the United States House of Representatives, a plan with one black majority district would satisfy the Section 5 nonretrogression requirement given no more dramatic shift in the statewide ratio of white-to-black voters than is demonstrated by a comparison of the 1980 and 1990 census figures. *See supra* note 21.

District 4 contains 63% registered black voters, significantly more than are needed to elect representatives of their choice. To greater or lesser degrees, all expert witnesses acknowledged—some only reluctantly under cross examination—that 63% black voting age population was well in excess of the percentage needed for reasonable comfort in creating a safe voting-age majority-minority district. For further confirmation that this is so we need only ask rhetorically "If 54% is sufficient in District 2, why must District 4 be supersaturated with 63% black voting age citizens?" No evidence was adduced by the Defendants to demonstrate a substantial difference between the voting patterns in the areas covered respectively by Districts 2 and 4—either in white crossover or black block voting—to rationalize the 54%-63% disparity in black voting age populations.

Although the witnesses at trial disagreed on the exact percentage of net white cross-over votes for black candidates, we find that the evidence supported an average, *net* white cross-over vote in non-judicial elections of between 10% and 25%.[65] The evidence at trial also indicated that minority voter registration is now comparable to white registration. Clearly, District 4 need not contain a black voting age population of 63% to satisfy the interest of a second district in which black officials can be readily elected. And, although it is not the province of this court in this case to establish the demographic specifications of the State's congressional redistricting plan, we find on the basis of the credible testimony and documentary evidence, that in this instance a district with a black voting age population of not more than 55%—and probably less—would have been adequate to ensure that blacks could elect a candidate of their choice, assuming they chose to exercise their franchise and assuming the candidate of their choice had more than a modicum of appeal for non-black voters.

Additional confirmation that the Plan is not narrowly tailored lies in its excessive disregard of traditional redistricting criteria and its derogation from third-party interests. Supreme Court precedent indicates that a variety of factors, both relative and absolute, are germane to analyzing whether a government measure is narrowly tailored. These factors include (1) the necessity of the measure, (2) the efficacy of alternative race-neutral measures, (3) the availability of more narrowly tailored (less intrusive) measures, (4) the flexibility and duration of the measure, and (5) *the impact of the measure on the rights of third parties.*[66] Relevant Supreme Court jurisprudence thus suggests that—in essence—a plan is not narrowly tailored if it adversely affects more interests, if it generally wreaks more havoc, than it reasonably must to accomplish the articulated compelling state interest. We find that the Plan thus offends.

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[65] In other words, on the average—for non-judicial elections in Louisiana—black candidates will gain more votes from white cross-over voters (whites voting for black candidates) than they will lose from black cross-over voters (blacks voting for white candidates): thus, there is a positive *net* white cross-over vote. To put it another way, black voters are—again on the average—more racially coherent/conscious than white voters.

Whether under a relative or a comparative analysis, the evidence adduced at Trial and at the Evidentiary Hearing undeniably established that, even in the face of the black population's wide dispersion in Louisiana (outside New Orleans), a second black majority district could have been drawn that would have done substantially less violence to traditional redistricting principles. For example, Marc Morial stated that "[t]here were alternatives which would have created a more compact black district that were not enacted . . . ." Similarly, Congressman Hayes admitted that a more compact plan could have been enacted. Freshman United States Congressman Cleo Fields—the former state senator and incumbent congressman from new District 4, who testified for the Defendants—also acknowledged that "it would have been possible to fulfill the desire of a second [black] majority district . . . and pay more attention than this District [District 4] does to both compactness and contiguity."

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[66] See, e.g., *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510-511, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989); *United States v. Paradise*, 480 U.S. 149, 171, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 510-15, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980).

Dr. Alan Litchman—one of the Defendants' expert witnesses at the Evidentiary Hearing—likewise testified that, were he to sit down with Dr. Ronald Weber (the expert on the other side) they "could create a [second black majority] district that looked better than this one [district 4]." And Dr. Weber—the Plaintiffs' expert witness at both the trial and the evidentiary hearing—testified that a plan could be devised that would include a second black majority district, yet still be significantly more compact and comport much more closely with other traditional redistricting principles.

The testimony of freshman state Senator Tom Greene at the Evidentiary Hearing was perhaps the most enlightening on this point. He stated that, with the neutral assistance of the Legislature's redistricting computer technician, he (Greene) actually created a plan that evinced greater respect for Louisiana's traditional parish boundaries than the Plan, and still included a second majority-black district. Finally, Mr. Glenn Koepp, who is the Assistant Secretary of the Senate and the technician in charge of reapportionment activity in Louisiana since 1981, testified that computer-supported mathematical modeling programs gave the State the tools to create several plans —including several with a second black district— that would respect traditional redistricting criteria to a much greater degree than does the Plan. Thus, the great weight of the credible evidence indicates that the Legislature could have developed and adopted a redistricting plan—even one with a second majority black district—that reflected greater respect for traditional redistricting criteria and that was less disruptive to the traditional political, social, economic, ethnic, geographical, and religious organization of the State. In short, substantially less extreme racially gerrymandered plans are readily available; plans without such obviously overbroad, overarching overkill.

In summary, we hold that the Plan is *not* narrowly tailored, either relatively or absolutely. This is so because it embraces considerably more racial gerrymandering—and thus more segregation—than is needed to satisfy any advanced state interest, and because the Plan unnecessarily violates a host of historically important redistricting principles, thereby adversely affecting countless third party interests. These several and varied interests—some constitutionally protected and others merely important—may not be callously sacrificed on the altar of political expediency, particularly when less broadly tailored plans are conceivable.[67]

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[67] We offer no opinion as to how much more narrowly tailored a plan would have to be to survive strict scrutiny. Indeed, we cannot say whether it is even possible—based on the 1990 Census—to devise a plan that would have two majority-minority districts and still be narrowly tailored *vel non*.

Even a plan that under the circumstances is as narrowly tailored as possible—in a *relative sense* (i.e., the least invasive and damaging plan available to further a compelling state interest)—may fail to be sufficiently narrowly tailored—on an *absolute* basis—to pass constitutional muster. For example, when the minority population is spread so evenly throughout a state that a majority-minority district cannot be drawn without dramatically impairing the constitutional rights of the citizens of that state, there may simply be no constitutionally permissible way to draw such a district, no matter how defensible the legislature's motives for wishing to do so, or how *bona fide* its efforts to tailor the plan narrowly.

IV

CONCLUSION

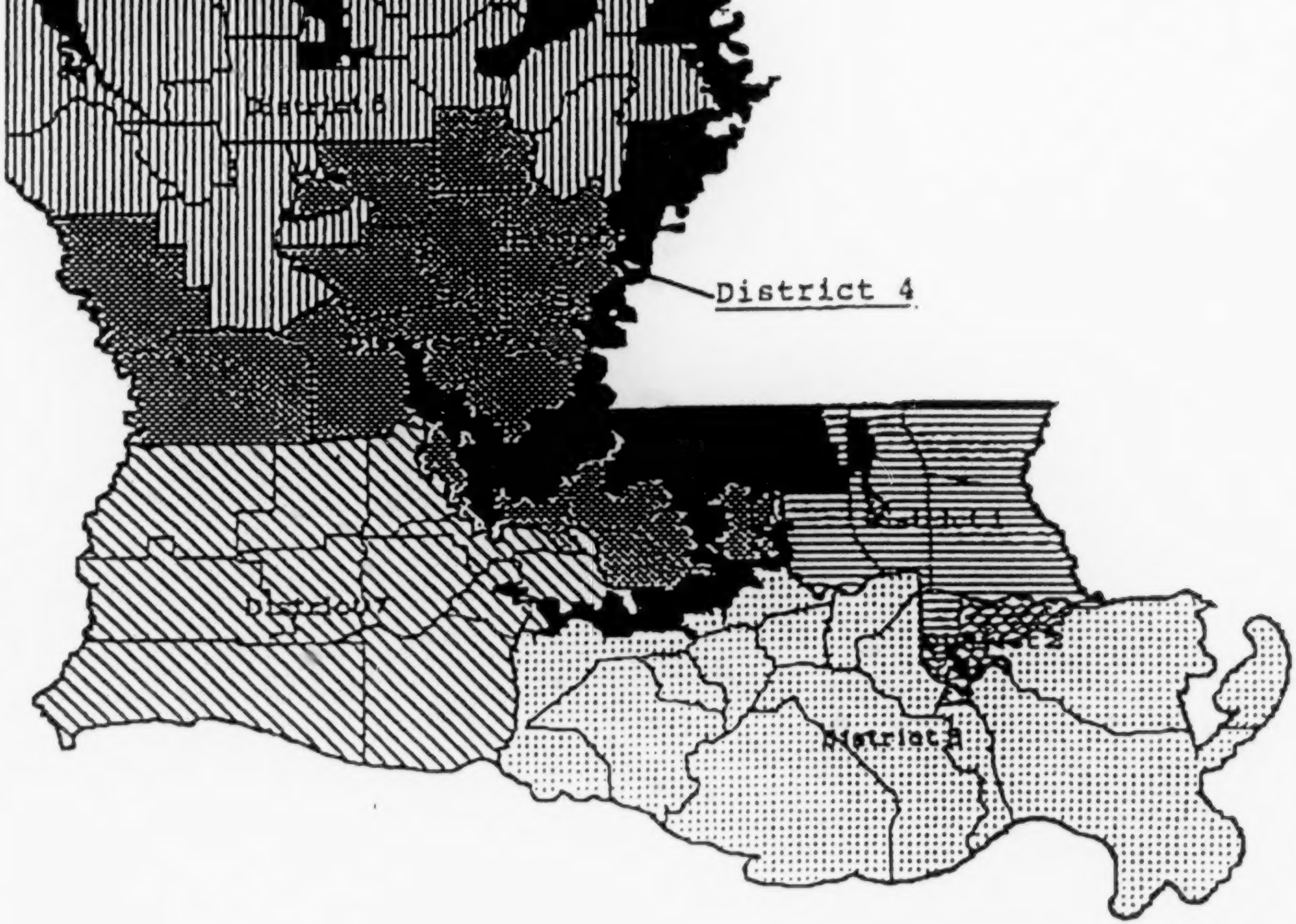
We find that the Plan in general and Louisiana's Congressional District 4 in particular are the products of racial gerrymandering and are *not* narrowly tailored to further any compelling governmental interest. We are therefore constrained to conclude that the Plaintiffs' right to equal protection as guaranteed by the United States Constitution is violated by the Plan. Consequently, we declare Act 42 of 1992 to be unconstitutional and the redistricting plan embodied therein to be null and void; and we enjoin the State of Louisiana from holding any future congressional elections based on the Plan. We do not, however, invalidate the 1992 congressional elections held thereunder; but we do hold that the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the Plan—and each district thus created—shall expire, *ipso facto*, at noon on the 3rd day of January, 1995, such terms of office and such districts not to be extended or carried over into the next Congress in any manner whatsoever.

APPENDIX A

The Seven Districts Created by Act 42

District	Total Pop.	Total White	Total Black	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
District 1	602,859	528,079	60,895	325,140	296,356	26,238
	100.00%	87.60%	10.10%	100.00%	91.15%	8.07%
District 2	602,689	213,832	367,460	295,953	113,917	177,634
	100.00%	35.48%	60.97%	100.00%	38.49%	60.02%
District 3	602,950	454,235	131,735	329,451	256,990	70,016
	100.00%	75.34%	21.85%	100.00%	78.01%	21.25%
District 4	602,884	198,389	400,493	309,357	112,241	195,351
	100.00%	32.91%	66.43%	100.00%	36.28%	63.15%
District 5	602,816	463,168	133,329	321,508	259,986	59,748
	100.00%	76.83%	22.12%	100.00%	80.86%	18.58%
District 6	602,854	502,982	87,718	329,071	289,575	38,032
	100.00%	83.43%	14.55%	100.00%	88.00%	11.56%
District 7	602,921	478,453	117,651	331,814	271,798	58,944
	100.00%	79.36%	19.51%	100.00%	81.91%	17.76%
Total	4,219,973	2,839,138	1,299,281	2,242,294	1,600,863	625,963
	100.00%	67.28%	30.79%	100.00%	71.39%	27.92%

APPENDIX B


District 4
District 3

Walter, District Judge, concurring:

I concur with the result of the majority opinion. However, since my examination of the case differs somewhat analytically, I write separately.

This court considered several questions: May a State enact a race-based reapportionment plan? If so, under what circumstances are race-conscious measures allowed? Finally, how do these requirements apply to Act 42.

I

LAW

> [I]n view of the constitution, in the eye of the law, there is no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved . . .
>
> The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law . . .
>
> The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race.

Plessy v. Ferguson, 163 U.S. 537, 558, 16 S.Ct. 1138, 1146 (1896) (Harlan, dissenting).

A

CONSIDERATION OF RACE IN REDISTRICTING LEGISLATION

Despite the legislation enacted to promote racial equality, many states remained recalcitrant to the Civil War amendments' mandates. Among the methods used by the states to evade the fifteenth amendment were poll taxes, literacy tests, and gerrymandered[1] districts. Responding to this perversion, Congress enacted the Voting Rights Act of 1965 "as a dramatic and severe response to the situation." *Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 2816, 2823 (1993). Amended in 1982, section 2 of the Voting Rights Act prohibits the dilution of a minority group's voting strength while section 5 mandates pre-clearance of newly created districts for those states that employed disenfranchising schemes in the past. The purpose of the voting rights legislation is to prohibit State efforts to abridge or deny minority representation. To this end, when pre-clearance is sought under section 5, the Department of Justice usually seeks maximization of minority voting strength to promote minority representation.[2] Since legislators are thus obligated to consider racial factors when redistricting, a delicate balance arises between promotion of minority suffrage and the color-bland strictures of equal protection.

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[1] Gerrymander is "[a] name given to the process of dividing state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines." Black's Law Dictionary (5th Ed.).

B

EQUAL PROTECTION

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14 § 1. Interpreting this clause nearly a century ago, the Supreme Court held in *Plessy v. Ferguson*, 163 U.S. 537, 558, 16 S.Ct. 1138, 1146 (1896) that the separate but equal doctrine comported fully with the Fourteenth Amendment. *Id.* at 548. "The majority [in *Plessy*] held that persons could be legally classified and treated in such a manner because of their race when the classifying law was a reasonable exercise of the police power. This meant that such laws must be reasonable, good faith attempts to promote the public good and not be designed to oppress a particular class." John E. Nowak, Ronald D. Rotunda, *Constitutional Law*, 618 (1991). As the Court itself stated:

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[2] It is my opinion that *Shaw v. Reno* did not fully address the constitutional or statutory authority behind Department of Justice pre-clearance requirements that arguably go beyond the Voting Rights Act. Thus, the Supreme Court may very well hold the Department of Justice's reliance on minimum "safe" percentages unconstitutional. I do not reach that question today but am troubled by the effect that these demands are having upon states seeking administrative pre-clearance rather than a declaratory judgment from the District Court of the District of Columbia.

> [W]e think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment.

Plessy, 163 U.S. at 548, 16 S.Ct. at 1142.

Fifty-eight years later, *Plessy's* flawed concept of equal protection was rejected. Although *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686 (1954) did not expressly overrule *Plessy* outside the realm of education, that case heralded the demise of separate but equal treatment of the races by the states. Over the past four decades, the Supreme Court has confronted the consideration of race in State and federal legislation and has fashioned specific guidelines for testing the constitutionality of such considerations.

The central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 113 S.Ct. at 2824. "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility." *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 493, 109 S.Ct. 706, 722 (1989). Accordingly, the Court has "held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest." *Shaw*, 113 S.Ct. at 2825. This test is known as strict or heightened scrutiny and is justified because:

> [a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Croson, 488 U.S. at 493, 109 S.Ct. at 721. These equal protection principles apply to statutes that "although race-neutral, are, on their face, 'unexplainable on grounds other than race,'" and classifications that are ostensibly neutral but are an obvious pretext for racial discrimination. *Shaw*, 113 S.Ct. at 2825 (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)).

Under current equal protection doctrine, "race-conscious state decisionmaking is [not] impermissible in *all* circumstances." *Shaw*, 113 S.Ct. at 2824 (emphasis in original). If State legislation contains explicit racial classifications, if it is inexplicable on grounds other than race, or if it contains race-neutral classifications that serve as mere pretext for racial discrimination, then courts are bound to apply the strict scrutiny regime. The classification must be *justified* by a *compelling* state interest, and then be *narrowly tailored* to fit that interest in order to survive constitutional scrutiny.

C

RACIAL GERRYMANDERING UNDER EQUAL PROTECTION

Redistricting legislation is almost always race-neutral on its face. Before *Shaw*, the Supreme Court had

> held that only two types of state voting practices could give rise to a constitutional claim. The first involves direct and outright deprivation of the right to vote, for example by means of a poll tax or literacy test . . . The second type of unconstitutional practice is that which affects the political strength of various groups in violation of the Equal Protection Clause. As for this latter category, [the Court] insisted that members of the political or racial group demonstrate that the challenged action have the intent and effect of unduly diminishing their influence on the political process.

Shaw, 113 S.Ct. at 2834 (White, J. dissenting). The latter category, known as "dilution," arises when voters are not deprived of the right to vote, but, through methods such as "cracking," "stacking," and "packing," certain groups are denied an *effective* vote. *See*, *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) ("UJO"); *Voinovich v. Quilter*, 507 U.S. ——, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). Acknowledging UJO and its progeny, *Shaw* went further, holding that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." *Id.* at 2826.

Supporting this holding is the now famous case of *Gomillion v. Lightfoot,* 346 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) in which the Alabama legislature redefined the boundaries of Tuskegee, essentially excluding all but a few black citizens from the district. The result was "a strangely irregular twenty-eight-sided figure." *Id.,* at 341. The Court found the scheme repugnant to the Fifteenth Amendment, holding:

> . . . Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remain uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purpose to a mathematical demonstration, that the legislation is soley concerned with segregating white and colored voters . . .
>
> It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens.

Id. at 341, 342. Therefore, racial gerrymandering, or legislation that manipulates district lines to achieve a predetermined racial result is subject to strict scrutiny.

D

PROVING A RACIAL GERRYMANDER

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563. Such invidious discriminatory intent or purpose need not be the legislature's dominant or primary consideration. Rather, proof that invidious discriminatory purpose was a motivating factor in the legislation will suffice. *Id.* Because improper racial classifications rarely appear on the face of legislation, the Supreme Court has identified subjects of proper inquiry in determining whether racially discriminatory intent existed. For example, legislation that "bears more heavily on one race than another" may indicate discrimination, *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976), as will historical patterns, *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267, 97 S.Ct. 555, 564 (1977), legislative history, *Id.*, irrationality pointing to nothing but racial classification, *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886), and direct evidence adduced, as in this case, before a three judge panel. *Shaw* stands for the proposition that bizarre reapportionment schemes such as that challenged in North Carolina and Act 42 fall into the *Yick Wo* category and may, in and of themselves, be evidence of invidious discrimination.

Of course, these indicators may be rebutted by evidence of wholly legitimate purposes. "The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." *Shaw*, 113

S.Ct. at 2826. When such legitimate purposes are disclosed and *accepted by the court*, heightened scrutiny is inappropriate. However, if the grounds asserted are an obvious pretext for racial discrimination or are simply *post hoc* arguments contrived to shield the segregation from judicial inquiry, the court must pursue the strict scrutiny regime.

E

STRICT SCRUTINY: WHEN IS A STATE INTEREST COMPELLING AND WHAT DETERMINES NARROW TAILORING?

1

COMPELLING STATE INTEREST

Few interests will be deemed "compelling" enough to justify State classifications according to race. The Supreme Court has given little indication as to what satisfies this portion of the strict scrutiny regime. However, the Court has accepted the correction of past governmental and private sector discrimination, *Richmond v. J.A. Croson*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed. 854 (1989), ethnic and racial diversification in the faculty and student bodies of state operated universities and professional schools, *see Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), and has suggested that States have a "very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and applied." *Shaw*, 113 S.Ct. at 2830. Despite the language in *Bakke*, the Court seems unwilling to allow any race-based measures outside a remedial setting[3]. *Croson*, 488 U.S. at 493, 109 S.Ct. at 721.

Although the States and their subdivisions may take action to remedy discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Croson*, 488 U.S. at 503, 109 S.Ct. at 727. That identification occurs when "judicial, legislative, or administrative findings of constitutional or statutory violations" are made. *Bakke*, 438 U.S. at 308-309, 98 S.Ct. at 2757-2758. Otherwise, "the dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Croson*, 488 U.S. at 504, 109 S.Ct. at 728.

2

NARROWLY TAILORED

Once an interest has been properly identified and accepted as compelling, the court must examine the classification in order to determine whether it is narrowly tailored to "fit" the interest involved. In deciding whether race-conscious remedies are appropriate, the court may consider several factors. Among these are the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief; and the impact of the relief on the rights of third parties. *U.S. v. Paradise*, 480 U.S. 149, 169, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203

---

[3] Compliance with federal law under the Voting Rights Act may be viewed as remedial and, therefore a state interest and perhaps compelling.

(1987). However, the relief must not go beyond what is reasonably necessary to accomplish the compelling interests. *See*, *Shaw*, 113 S.Ct. at 2831.

Therefore, this court must first determine how the districts were drawn, that is, whether they were drawn along race lines or not. To do so, this Court will examine the factors listed in section D above. If the State counters with a legitimate non-racial explanation for Act 42's configuration, this Court will defer to the Legislature and refrain from reviewing the merits of their decisions. However, if a motivating factor behind the reapportionment scheme was racial, strict scrutiny applies. Then we turn to whether the State had a compelling interest supporting racial discrimination. We will expect the State to provide specific evidence warranting its action and require a nexus between the action and the interest. Finally, we will examine whether Act 42 itself was narrowly tailored to fit the compelling interest in light of the factors discussed above.

II

ANALYSIS

A

ACT 42 IS A RACIAL GERRYMANDER

This court found the evidence to indicate overwhelmingly that the intent of legislature was to divide Louisiana's congressional districts along racial lines. The inferential evidence and the direct testimony of legislators for both the plaintiffs and the State allow no other conclusion. It is true that the State attempted to demonstrate non-racial explanations for the highly irregular districts. In light of the testimony at both the trial and evidentiary hearing, these suggestions are but *post hoc* rationalizations.

The evidence before the Court demonstrated that the State Legislature acted as it did to gain preclearance and contrived the interest of correcting past discrimination for the purpose of the evidentiary hearing alone. Finally, as the majority notes above, most witnesses readily admitted to the availability of other plans less offensive to traditional districting patterns and or smaller racial discrepancies.

B

ACT 42 IS SUBJECT TO STRICT SCRUTINY

As our factual findings denote, Act 42 is a clear example of a racial gerrymand~~er. Specifi~~cally, District 4 permits no conclusion other than classic segregation. Both the facial irregularity without plausible non-racial explanation[4] and the explicit testimony

---

[4] The defense elicited testimony that District 4 actually represents certain commonalities of interest. Essentially, the State suggested that certain interests are predominantly shared by Blacks and therefore District 4 has a sufficient non-racial justification. This is exactly the type State action that our color-blind Constitution prohibits. As the *Shaw* Court held:

> "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which

of the legislators require this finding. Since redistricting along racial lines was a *motivating factor*, Act 42 is subject to strict scrutiny. This panel must now determine whether Act 42 was justified by a compelling governmental interest and that the means chosen by the State to effectuate its purpose were narrowly tailored to the achievement of that goal.

1

COMPELLING INTERESTS

The State advanced two main compelling interests behind the racial gerrymander. I discussed the findings required by *Croson*, *Wygant*, and *Bakke* when a State attempts to rely on prior discrimination as

---

> they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.
>
> The message that such districting sends to elected representatives is equally pernicious. When a district is obviously created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy." *Id.* at 2827.

I agree with what I perceive to be Justice O'Connor's views. If a multi-cultural State in which voters shared interests not according to the color of their skin but the content of their lives and experiences was the Legislature's goal, the tampering would have resulted in more evenly split districts. The races would then have to reconcile their differences with one another and move forward on common ground.

a foundation for remedial action. I see no reason why the same analysis should not apply when a state argues that compliance with federal anti-discrimination law mandated the jurisdiction's race-based action. In order to rely on "remedying past discrimination" and "obeying the law," a State must "demonstrate a strong basis in evidence for its conclusion that remedial action was necessary." *Croson,* 488 U.S. at 510, 109 S.Ct. at 730. I examine each purported interest in turn to see if the State has met this burden.

a

Past or Present Discrimination

"Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant,* 476 U.S. 276, 106 S.Ct. 1848. The Supreme Court has firmly held that States must have "convincing evidence that remedial action is *warranted.*" *Id.* While there is no doubt that Louisiana has a sorry history of race relations, the defense did not provide evidence that the Legislature had before it the necessary factual predicate warranting a voluntary affirmative action redistricting plan. In fact, the evidence supports the conclusion that the Legislature did not create Act 42 for the purpose of remedying past discrimination at all. Thus, if the State does intend to redistrict along racial lines with the goal of correcting past electoral discrimination, it must demonstrate what evidence warrants a finding of discrimination and how a specific plan relates to the elimination thereof.

b

Pre-clearance from the Department of Justice

The State legislators acted under the assumption that failure to create a second majority-minority district would result in the denial of pre-clearance by the Department of Justice. This assumption seems to be founded upon the rejection of two non-congressional plans by the Department of Justice. However, both letters from the Civil Rights Division acknowledged that the plans satisfied Section 5 pre-clearance requirements but rejected the plans because they could have been drawn more effectively. The *Shaw* opinion held that a state interest in complying with federal law is compelling only as constitutionally interpreted and applied. Additionally, by pointing out the distinction between what the law *requires* and what it *permits*, the Court stated that even valid plans under the Voting Rights Act must comport with the Fourteenth Amendment. Because the Voting Rights requirements do not give covered jurisdictions *carte blanche to* engage in racial gerrymandering in the name of nonretrogression, the question for this court is whether the State of Louisiana had a strong basis in evidence for the belief that failure to create a second majority-minority district would violate Section 2 or 5 of the Voting Rights Act.

(1)

Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 was enacted to accomplish the guarantees of the Fifteenth Amendment. Specifically, Section 2(a) prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." This section therefore rejects State actions that, "interacting with social and historical conditions, impair the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, —— U.S. ——, 113 S.Ct. 1149, 1155 (1993). If, under the totality of the circumstances, a State's apportionment scheme has the effect of diminishing or abridging the voting strength of a protected class, a Section 2 violation has occurred. *Id.* These "dilution" claims involve three threshold conditions.

> First, they must show that the minority group 'is sufficiently large and geographically compact to constitute a majority in a single member district.' Second, they must prove that the minority group " 'is politically cohesive.' " Third, the plaintiffs must establish 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'

Id. at 1157 (quoting *Gingles*, 507 U.S. 30, 50-51, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986)). District 4 is evidence alone that the minority population large enough to constitute a majority in a single member district is not geographically compact. Without satisfaction of this initial *Gingles* condition, it is impossible to find that the State had a rational basis to believe that failure to create a second majority-minority district would violate Section 2. Reliance on possibly invalid applications of the Voting Rights Act by the Department of Justice cannot create a compelling state interest. If so, the Department of

Justice and various States could sidestep the holdings of *Croson*, *Gingles*, and *Shaw* with ease.

(2)

Section 5 of the Voting Rights Act

Similar findings are required under the "nonretrogression" analysis of Section 5. If the State had no basis to believe that one majority-minority district out of seven districts would constitute retrogression, then reliance on Section 5 as a compelling interest is misplaced. "Under [the nonretrogression] principle, a proposed voting change cannot be pre-cleared if it will lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Shaw*, 113 S.Ct. at 2830 (quoting *Beer v. U.S.*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976)). On its face, creating one district out of seven when the previous ratio was one district out of eight is not retrogressive. Once again, the legislature appears to have founded their belief that one district out of seven is retrogressive completely on the Department of Justice's previous unrelated rulings and the assumption that a gerrymandered second district was a requisite to pre-clearance. Without restating the points made above, I find such an assumption, without additional evidence, uncompelling.

In summary, I find *post hoc* reliance on past discrimination and warrantless assertions that the Voting Rights Act mandated a second district, unpersuasive. This is not to say that the State cannot rely on those interests to justify future affirmative action. Rather, I find that the basis forwarded by the State to claim these interests as compelling is so slim that they reek of the pretextual and the contrived.

2

NARROWLY TAILORED

Even if this panel were to overlook the dearth of *Croson*-type findings in this case, Act 42 cannot be termed narrowly tailored to fit the interests above. Since I concur in the majority opinion, I find no reason to reiterate their conclusions that Act 42 is not narrowly tailored to fit any compelling interest.

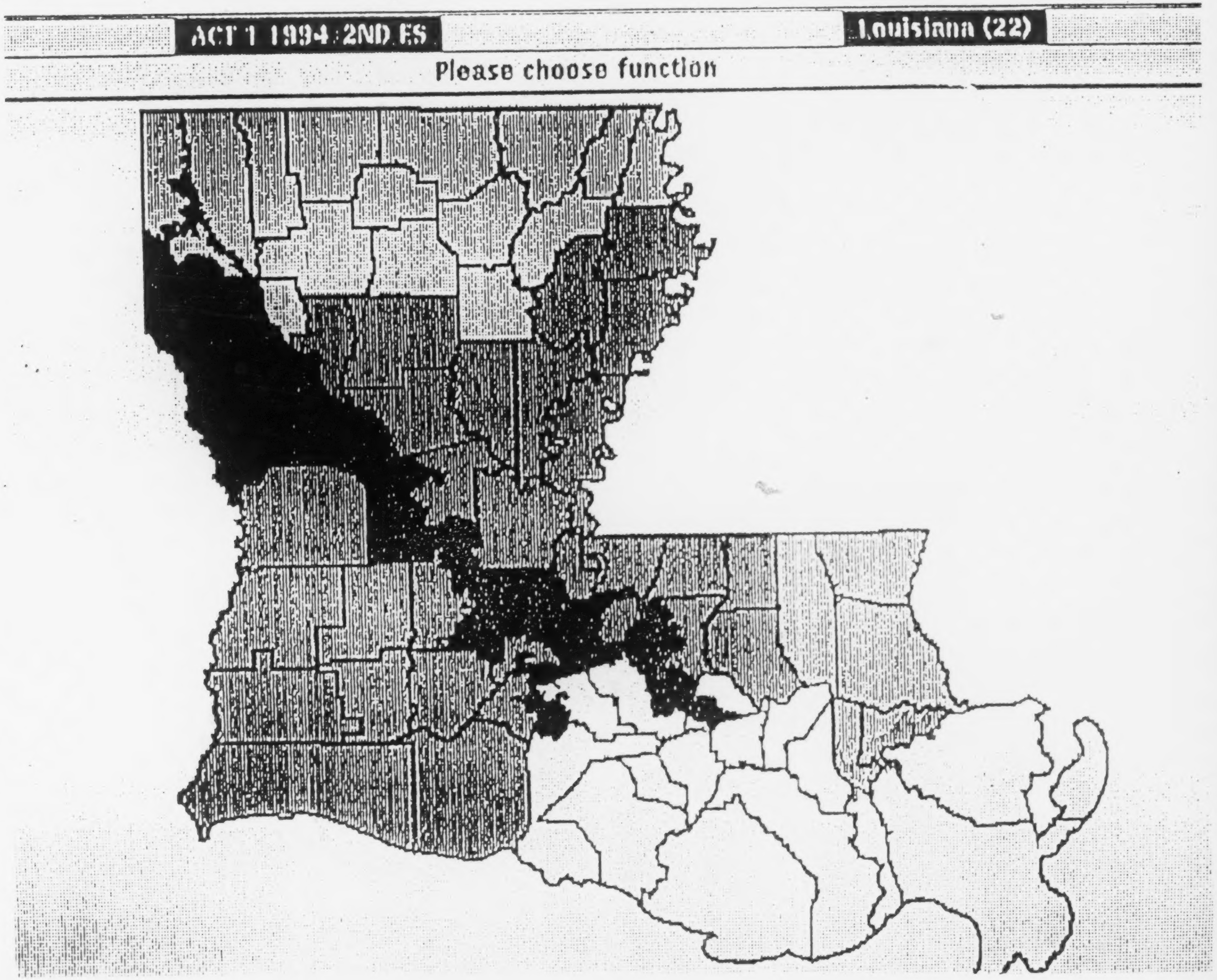
III

CONCLUSION

I am gravely disturbed by the history of racial discrimination in this country and State, but I believe that segregation of voters by race will achieve nothing but more discrimination, more separation, more animosity and would push Justice Harlan's and Dr. King's dream for this nation ever further into ~~the~~ future. One hundred and thirty years ago this nation endured a bloody civil war to ensure freedom and equality for all. That pledge, so dearly bought, remains elusive, but the concept that people defined only by race should receive separate representation in the legislative bodies of our government mocks the goals for which so many have suffered and died. Indeed, in my opinion, it breathes life into the discredited doctrine announced by the majority in *Plessy*, forty years after the Supreme Court administered what should have been its mortal wound.

The districts created under Act 42 are the creatures of a racial gerrymander. The circumstantial and direct evidence supported no other conclusion. Therefore, strict scrutiny applies to Act 42. Under that regime, the justifications offered by the State for its race-based measures were not accompanied by the requisite factual predicate. Additionally, the measures taken were not narrowly tailored to fit the interests, however baseless, advanced by the State.

APPENDIX D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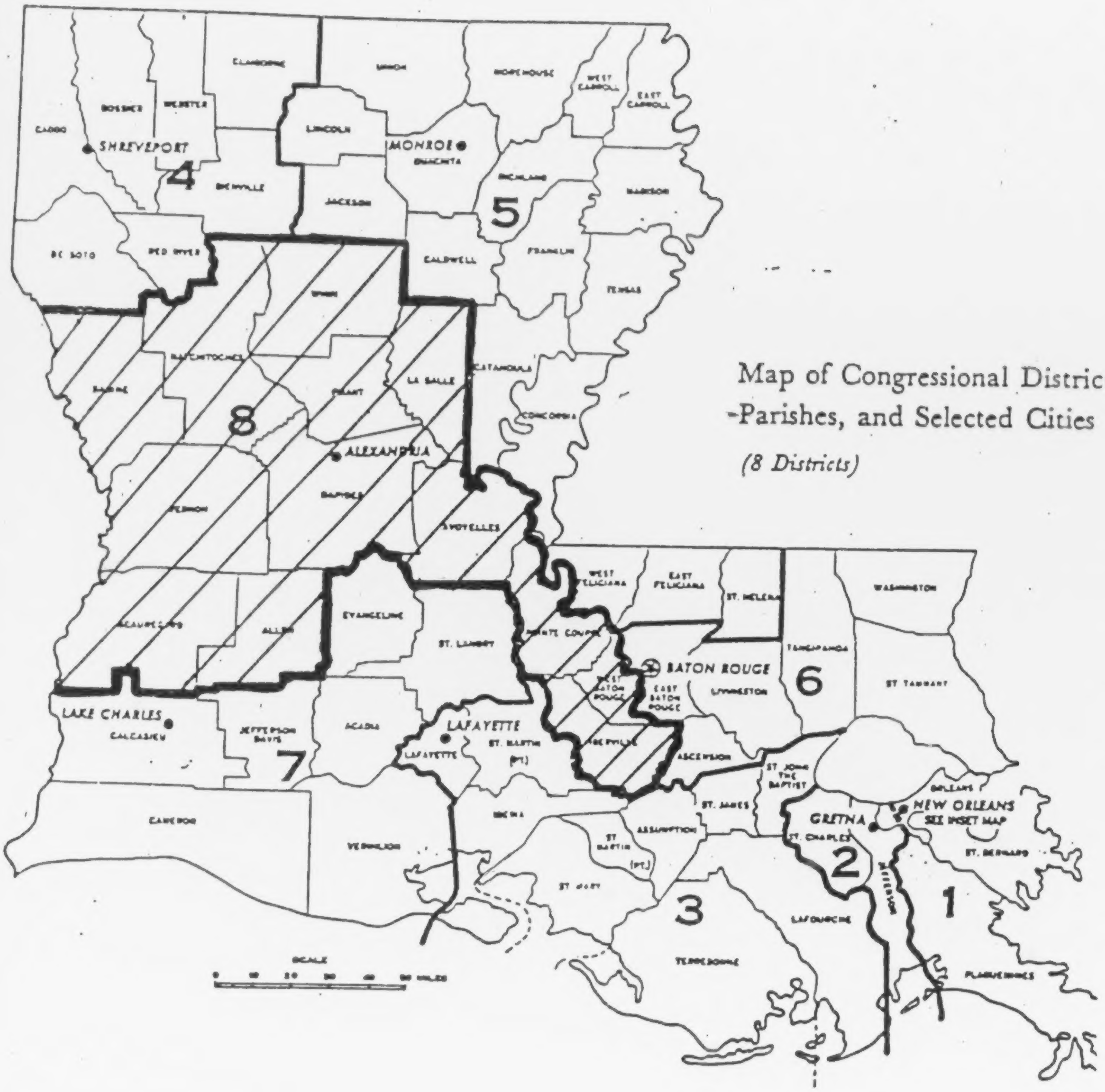
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SEE INSET MAP
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WEBSTER
CLAIBORNE
UNION
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JACKSON
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RED RIVER
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AVOYELLES
BEAUREGARD
ALLEN
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POINTE COUPEE
WEST FELICIANA
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IBERVILLE
ASCENSION
ST. JOHN THE BAPTIST
ST. JAMES
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PLAQUEMINES
LAFOURCHE
TERREBONNE
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Map of Congressional Distric
-Parishes, and Selected Cities

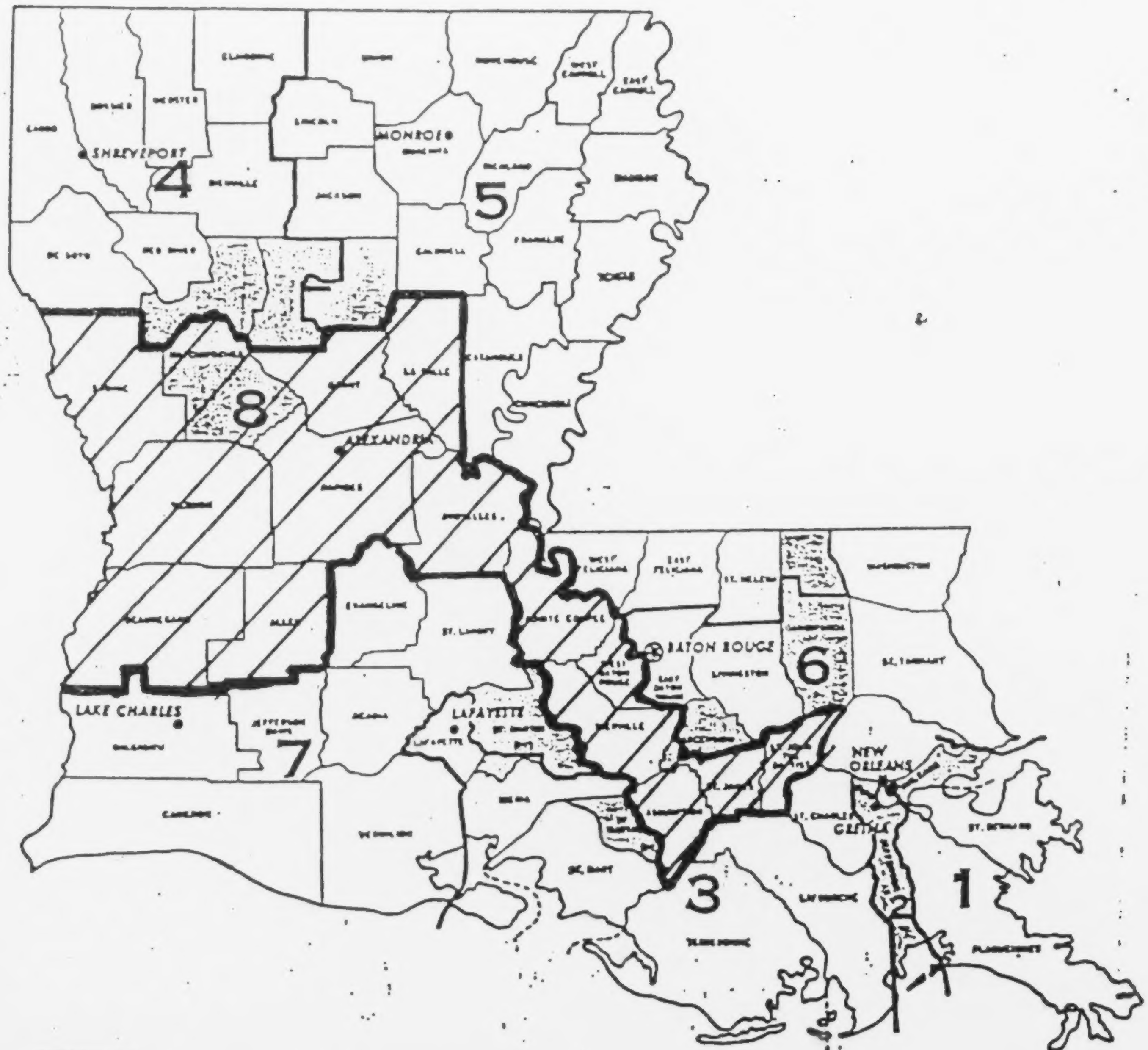
(8 Districts)

U.S. Department of Commerce
Bureau of the Census

1971-1972

LOUISIANA

(8 districts)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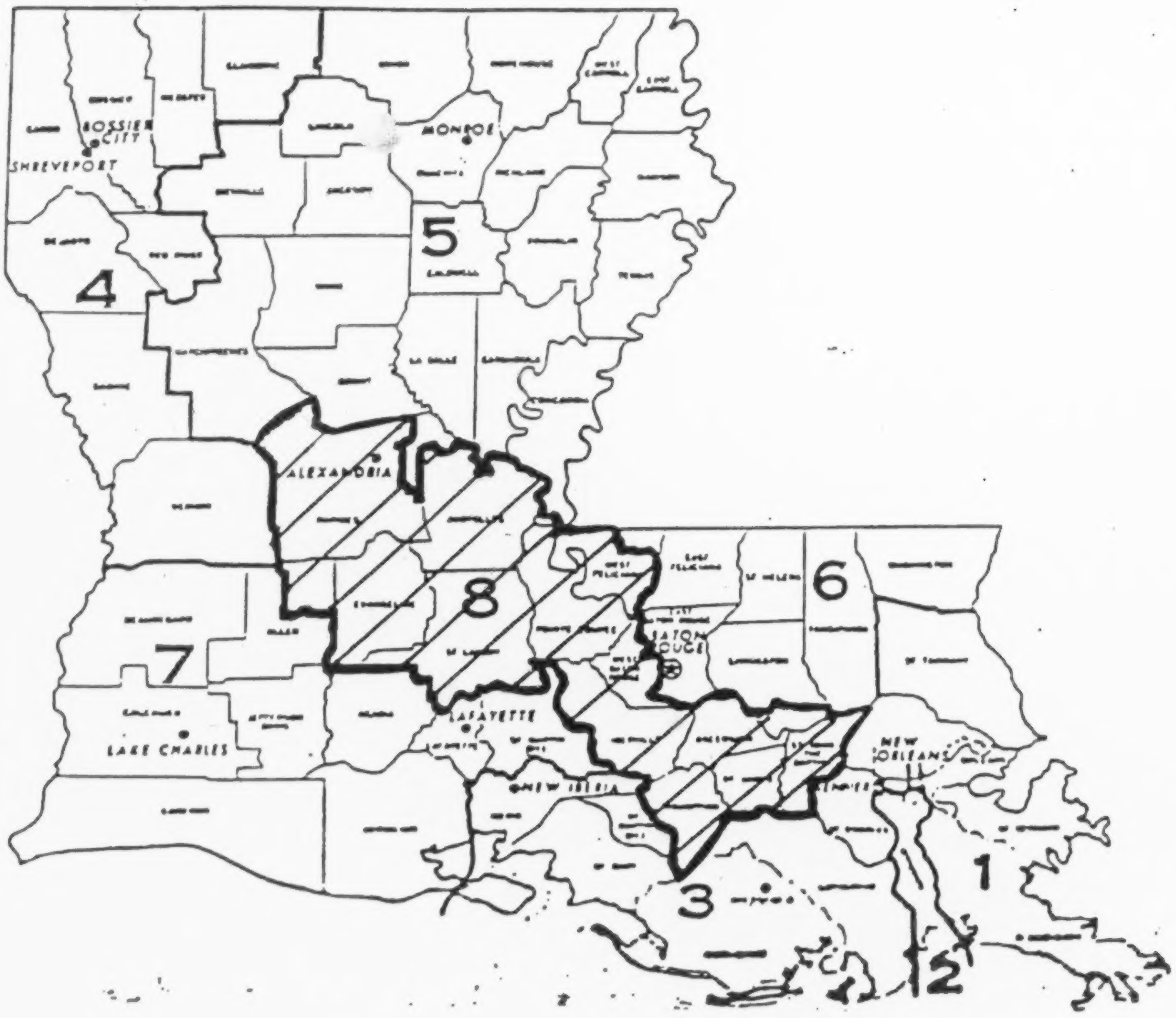
8
Parish with two or more Congressional Districts

LOUISIANA

(8 districts)

1973-1982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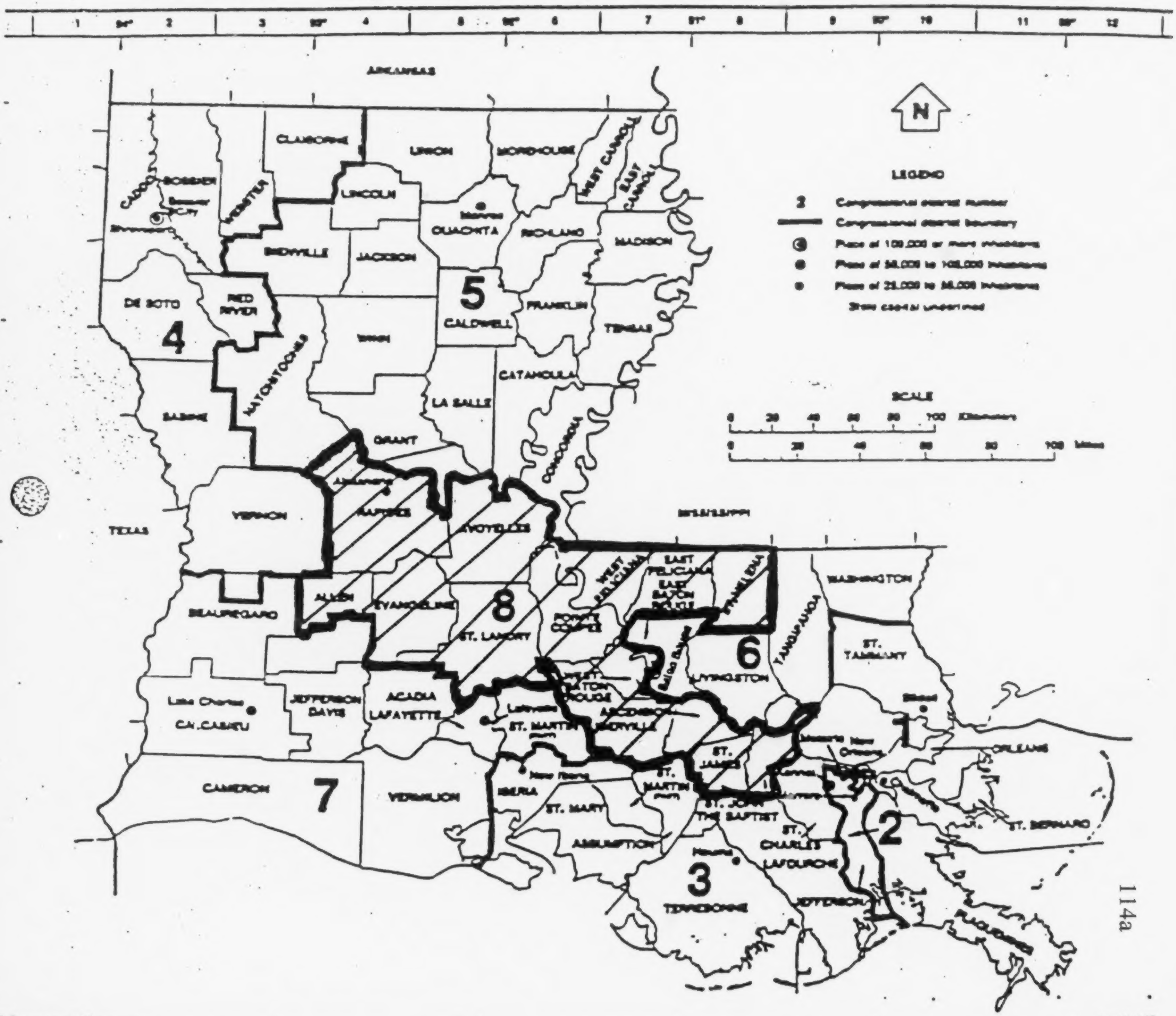
1983-1992

LOUISIANA

LOUISIANA — Congressional Districts, Parishes, and Selected Places — (8 Districts)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Shreveport
WEBSTER
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LINCOLN
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EAST CARROLL
Monroe
OUACHITA
RICHLAND
MADISON
BIENVILLE
JACKSON
DE SOTO
RED RIVER
WINN
CALDWELL
FRANKLIN
TENSAS
NATCHITOCHES
SABINE
LA SALLE
CATAHOULA
CONCORDIA
GRANT
Alexandria
RAPIDES
VERNON
AVOYELLES
WEST FELICIANA
EAST FELICIANA
EAST BATON ROUGE
ST. HELENA
WASHINGTON
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EVANGELINE
ST. LANDRY
POINTE COUPEE
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TANGIPAHOA
LIVINGSTON
ST. TAMMANY
Slidell
Lake Charles
CALCASIEU
JEFFERSON DAVIS
ACADIA
LAFAYETTE
Lafayette
WEST BATON ROUGE
ASCENSION
IBERVILLE
ST. MARTIN
ST. JAMES
Metairie
New Orleans
ORLEANS
Kenner
CAMERON
VERMILION
IBERIA
New Iberia
ST. MARY
ST. MARTIN
ST. JOHN THE BAPTIST
ST. CHARLES
ST. BERNARD
ASSUMPTION
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LAFOURCHE
TERREBONNE
JEFFERSON
PLAQUEMINES
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Congressional district boundary
Place of 100,000 or more inhabitants
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Place of 25,000 to 50,000 inhabitants
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U.S. Department of Commerce BUREAU OF

ional districts established November 20, 1981; all other boundaries are as of January 1, 1980.

APPENDIX E

[Filed Jul. 26, 1994]

IN THE
UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Civil Action No. CV 92-1522S

RAY HAYS, EDWARD L. ADAMS,
SUSAN SHAW SINGLETON, AND
GARY STOKLEY, PLAINTIFFS

v.

EDWIN EDWARDS, in his official capacity as Governor of the State of Louisiana; SAMUEL B. NUNEZ, in his official capacity as President of the Louisiana State Senate; JOHN A. ALARIO, in his official capacity as Speaker of the House for the State of Louisiana; W. FOX MCKEITHEN, in his official capacity as Secretary of State for the State of Louisiana; JERRY FOWLER, in his official capacity as Commissioner of Elections for the State of Louisiana; and certain UNIDENTIFIED STATE LEGISLATORS, DEFENDANTS

UNITED STATES OF AMERICA,
DEFENDANT-INTERVENOR

NOTICE OF APPEAL

Notice is hereby given that the defendant-intervenor, United States, hereby appeals to the

United States Supreme Court from the Judgment of the United States District Court, Western District of Louisiana (three-judge court), entered on July 25, 1994.

This appeal is taken pursuant to 28 U.S.C. 1253.

Respectfully submitted,

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Assistant Attorney General

/s/ Richard Jerome
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/s/ William J. Flanagan
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APPENDIX F

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 5 of the Voting Rights Act, 42 U.S.C. 1973c provides:

> Whenever a State or political subdivision with repect to which the prohibitions set forth in section 1973b(a) of this title based upon determina-

tions made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney Geenral has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 301157 86213

Supreme Court, U.S.
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No. 94-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF LOUISIANA, *et al.*,
Appellants,
v.
RAY HAYS, *et al.*,
Appellees.

On Appeal from a Three-Judge Panel of the United States District Court for the Western District of Louisiana

MOTION TO AFFIRM

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Dated: October 28, 1994

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QUESTIONS PRESENTED

1. Whether Louisiana Act 1 was properly subjected to strict scrutiny when a three-judge panel unanimously found it was so bizarre on its face that it could be understood only as an effort to segregate voters by race.
2. Whether Louisiana has a compelling interest in racial gerrymandering when there has been no showing that a second majority-minority district is required by the Voting Rights Act or otherwise necessary to remedy discriminatory voting practices in Louisiana.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-558

STATE OF LOUISIANA, ET AL.,
Appellants.
v.
RAY HAYS, ET AL.,
Appellees.

On Appeal from a Three-Judge Panel
of the United States District Court
for the Western District of Louisiana

MOTION TO AFFIRM

Appellees respectfully urge that the Court affirm the judgment below invalidating Louisiana Act 1. Act 1, like its predecessor Act 42, segregates black and white voters intentionally and disproportionately into separate districts by race. District 4, in particular, is a bizarre construction built from blocks of black voters split from twelve different parishes scattered along a 250-mile-long axis. With white voters from the same parishes reciprocally concentrated in adjacent districts, the three judge panel correctly found a constitutionally suspect racial gerrymander under *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

No compelling state interest justifies Louisiana's frank attempt to create a political culture of reciprocal racial domination. This Court distinguished in *Shaw* between what the Voting Rights Act, 42 U.S.C. § 1973 et seq. (VRA) "permits, and what it requires," and stressed that the three conditions of *Thornburg v. Gingles*, 478 U.S. 30 (1986), "never can be assumed but specifically must be proved in each case." 113 S. Ct. at 2830. No such factual proof was made below by either the Justice Department (DOJ) or Louisiana.

The retrogression principle of Section 5 of the VRA does not require Act 1 because the power of Louisiana's black voters would be enhanced following the 1990 census even without a second majority-minority district. *Beer v. United States*, 425 U.S. 130, 141 (1976). Nothing in the VRA requires Louisiana to include a second majority-minority district. Appellants retreat instead to the tenuous contention that a second black district was required because Louisiana "reasonably believed" that it would have had difficulty showing that its failure to create such a district "was free of discriminatory purpose." (U.S. J.S. 19). But even if that test could be squared with the VRA and were otherwise constitutional, there is no record evidence to support its application in this case, and accordingly, the decision below must be affirmed.

STATEMENT OF THE CASE

From start to finish, race has been the controlling consideration in drawing Louisiana's Congressional districts in response to the 1990 census. But the blame for resegregating Louisiana does not lie only with the State Legislature. From 1991 onward, the DOJ, under cloak of its Section 5 authority, threatened and cajoled the Legislature into creating two black districts and five white districts. The Legislature twice now has done DOJ's bidding only to have its gerrymandered districts invalidated by a panel of three Louisiana federal judges. This appeal turns entirely on whether the facts found by the court below satisfy the requirements of *Shaw* and this Court's other precedents.

A. Background of Plaintiffs' Challenge to Louisiana's Congressional Redistricting

All four plaintiffs are registered Democrats. Ray Hays is white and has spent many years working as a grassroots political organizer. He has seen racial polarization weaken and divide blacks and whites in Louisiana and across the country. As a State Committee Member of the Democratic Party from a minority district, he has worked to elect black candidates in Louisiana not by concentrating only on black voters, but by building broad-based support of all voters. He brought this suit as the only available means of fighting the alarming trends he perceived in the democratic process. Plaintiff Ed Adams was the first black in his field to enter Louisiana State University, and was one of the first public school principals in Orleans parish. Plaintiff Gary Stokley is a tenured sociology professor at Louisiana Tech, is active both in Democratic politics and community affairs, and works on behalf of black-supported candidates. Plaintiff Susan Singleton is of Asian descent and shares her co-plaintiffs' concern that Louisiana politics is becoming increasingly structured along racial lines.

In 1991, as both Appellants note, the Louisiana legislature redistricted the eight-member Board of Elementary and Secondary Education (BESE). Initially, the legislature created one compact majority-minority district (in New Orleans) but the Justice Department denied VRA Section 5 preclearance unless and until a second "safe" black district was established. DOJ's refusal to preclear Louisiana's *eight-member* BESE plan led some to believe that the Justice Department would require two "safe" black seats when it redrew the lines for the newly-reduced, *seven-member* Louisiana Congressional delegation.

It was not until the spring of 1992 that the Louisiana Legislature finally began to debate how the boundaries of Louisiana's seven congressional districts were to be drawn. Act 42 was passed by the legislature and signed by the Governor in June of 1992. Ray Hays, who had opposed drawing district boundaries along racial lines during the legislative debates, immediately filed suit with his fellow plaintiffs under the United States Constitution, the Louisiana Constitution, and VRA Section 2. Following a two-day trial in August 1992 and a further evidentiary hearing after this Court's *Shaw* decision, a three-judge panel, consisting of Circuit Judge Wiener (from Shreveport) and District Judges Shaw and Walter (from Lafayette and Shreveport respectively) invalidated Act 42. *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993).

B. The Challenge to Act 42

Challenged on constitutional grounds, Act 42 was destined to fail from its inception. The map of Act 42's districts screamed out that something was amiss. Its appearance alone was enough to persuade the court that Act 42 was a racial gerrymander under *Shaw v. Reno*:

> District 4 snakes narrowly across Louisiana soil from end to end for more than 600 miles. A rectangle superimposed on the Z-shaped figure formed by District 4 would overlay two-thirds of the State. Additionally, as it winds along its erratic path, District 4 projects myriad diverticulae to encapsulate small sacs of otherwise widely dispersed black voters. No one could claim that District 4 is compact, at least not with a straight face.

(U.S. J.S. App. 64a-65a). The court further noted that "at some places along its attenuated path, District 4 is no more than 80 feet wide. Such tokenism mocks the traditional criterion of contiguity." (U.S. J.S. App. 65a). Overall, District 4 encompassed only four whole parishes, and slivers of 24 others, leading the panel to conclude that "[o]n the basis of District 4's physiognomy alone, the Plan is thus highly irregular, suggesting strongly that the legislature engaged in racial gerrymandering." (U.S. J.S. App. 63a).

While District 4's contorted shape was enough for the court to conclude that it "rationally cannot be understood as anything other than an effort to segregate voters on the basis of race," *Shaw*, 113 S. Ct. at 2826 (citations omitted), the panel did not stop there. Instead, it listened to the State's own witnesses. For example, Willie Hunter, a black state legislator, testified that the Legislature's intention "was to create a district where there was an excellent possibility of having another black elected . . ., and that to accomplish this they 'looked at numbers [of black voters] period.'" Professor Engstrom, the State's expert witness admitted unashamedly that "race drove . . . [the creation of] . . . the Districts." In response to the court's query whether the Legislature had created a racial gerrymander, Defendants' counsel bluntly admitted that it had, insisting that segregating voters by race is "exactly what [the Legislature] can do . . . ." (U.S. J.S. App. 75a).

At a second evidentiary hearing following this Court's *Shaw* decision, the witnesses were more guarded, but still could not disguise the racial basis for Act 42. According to one legislator, "[i]t was the intent of the Legislature to create . . . [a] . . . second majority black district." (U.S. J.S. App. 76a). The State's experts again admitted, albeit more circumspectly, that "the primary determinant" of the questioned districts was race. (U.S. J.S. App. 76a.). Summarizing the testimony from the initial trial and the post-*Shaw* evidentiary hearing, the court observed that "[n]ot one witness, Plaintiffs' or Defendants', testified that Act 42 was not largely a product of racial gerrymandering—not one." (U.S. J.S. App. 76a).

The panel was reluctant to attribute the stark race-based thinking underlying Act 42 only to the State. To the contrary, the panel found that the Department of Justice:

> must be regarded as an active player in this case. . . . [t]he testimony at the Trial and at the Evidentiary Hearing reflected overwhelmingly that the Attorney General's Office (AGO) had let it be known that preclearance would not be forthcoming for any plan that did not include at least *two* "safe" black districts out of seven.

(U.S. J.S. App. 53a n.21). DOJ had "arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies, rather than as a shield to prevent lamentable historical abuses." (U.S. J.S. App. 57a n.21). Kowtowing to the Justice Department, however, was only part of the story. Indispensable support for the plan came from Republicans, who "perceived various benefits in the correlative whitening of some districts that attends the intentional segregation of black voters into other adjacent districts." (U.S. J.S. App. 77a).

C. The Legislature's Replacement of Act 42 with Act 1 and the Three-Judge Panel's Subsequent Invalidation of Act 1

Before this Court could consider the case, the State legislature held a special legislative session that began on April 18, 1994, and one week later replaced Act 42 with Act 1. Act 1 still segregated the state into two black and five white districts, but substituted for the former "Zorro District" a new configuration in the form of a narrow wedge, splitting the state along three quarters of its width, clawing concentrated enclaves of black voters away from their white neighbors. As subsequently described by the court, the new District 4 "cuts across historical and cultural divides, splits twelve of its fifteen parishes and divides four of the seven major cities of the State."

(U.S. J.S. App. 3a). It is telling that although blacks comprise only 30% of the population of the parishes split by District 4, the portions of those parishes included within District 4 are over 60% black.[1] Despite substituting a wedge for the old "Z", the same race-based intentions and even more blatant prodding from the Justice Department explained Act 1.

1. The Court's Factual Findings

The same panel of judges that reviewed Act 42 held a two-day trial on Act 1 in July 1994. The court was provided five volumes of materials from the legislative proceedings, including transcripts of committee hearings in both Houses, as well as audiotapes of legislative debates and dozens of exhibits and maps that illustrated the parishes and cities split by Act 1. During the trial, the court heard from two State Senators, the State Senate's assistant secretary, and two expert witnesses—a geographer and a sociologist. Overall, the court concluded that

> Misinterpreting our opinion of December 1993 as approving a racially gerrymandered district if it contained no more than 55% minority registered voters; and remaining convinced that the Department of Justice would not pre-clear any plan that did not contain two majority/minority districts, the legislature embarked on an endeavor to comply with those demands and still secure adoption.

(U.S. J.S. App. 4a).

The court incorporated by reference the prior opinion and factual findings regarding Act 42. The court began, as before, with the odd shape of District 4. As with Act 42, the court found that "[t]hose persons involved directly with the formation of Act 1 acknowledged that the creation of a second majority-minority district was the specific intent of the Legislature." (U.S. J.S. App. 4a). The court dismissed the race-neutral explanations belatedly espoused by the State's witnesses as simply not credible. The following is a sample of that evidence, all of it ignored by Louisiana and the United States in their Jurisdictional Statements.

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[1] The demographic statistics on District 4's split parishes are attached as Appendix A at 1a-3a. Ascension Parish, for example, is at the far eastern point of District 4 and is split by a sharp point. (*See* map at App. 19a). Although Ascension is only about 24% black, the wedge that District 4 cuts from it is about 68% black. (*See* App. 3a).

The Senate Committee, for example, heard testimony from community leaders on the redistricting. One group, referred to by Senator Brinkhaus as "the '2' group supporting two" (Sen. Comm. Tr. 118)[2] spoke almost entirely about race. One member urged

> black people need to have two [majority districts], and we want nothing less. . . . You know we deserve two majority districts, I don't have to draw a map for you to know that. With all of the black people in this State, certainly we should have two majority districts.

(Sen. Comm. Tr. 94-95). Another asserted "[a]nd all we're asking for is give us two, that *we have a voice in Washington to help us*." (Sen. Comm. Tr. 112) (emphasis added). Still another demanded: "give us no less than two Congressmen." (Sen. Comm. Tr. 115).

Many of the Senators' and Representatives' speeches reflected a similar racial theme. Senator Bajoie, a leader of the Legislative Black Caucus, stated that "in order for African-Americans in Louisiana to elect Congressional members of their choice, [we] should retain two majority African-American districts with a majority voting age population and nothing less is acceptable." (Sen. Comm. Tr. 70-71).[3] Concerning an alternative plan on the House floor, one Representative stated that "[i]t was absolutely necessary to get a minority district. I make no bones about it. The intent of this plan was to have two North Louisiana districts and two minority districts." (House Comm. Tr. 107).[4]

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[2] Hearing Before the Committee on Senate and Governmental Affairs of the Louisiana Senate, April 18, 1994 (Appendix B of Plaintiff's Motion for Preliminary Injunction and Amended Complaint).

The chorus of "two and nothing less" was amplified by the previous demands of the Justice Department. Senator Brinkhaus lamented that "[m]ost members of the Congressional Delegation recognize the plan is about the best that can be drawn and still satisfy the U.S. Justice Department and Federal Court." (Sen. Comm. Tr. 214). A prominent Representative agreed: "the testimony given this committee was that we had to draw two minority districts or the Justice Department would not approve it." (House Comm. Tr. 51).

With support for two black districts hanging in the balance, the Justice Department took a more aggressive role. On April 20, two days after the House and Senate committee hearings, the Assistant Attorney General informed the Louisiana Legislative Black Caucus of DOJ's views.[5] Expressly noting that "the Louisiana legislature is now in session" to consider "a new congressional redistricting plan," the Assistant Attorney General opined that "it remains reasonable to conclude that the Voting Rights Act requires the state to devise a congressional redistricting plan with two black-majority districts. Moreover, such a plan can be devised in a way that would not run afoul of the Supreme Court's ruling in *Shaw v. Reno.*"[6] Five days after this letter was sent, Act 1 passed both houses of the Legislature.

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[3] In comparing two bills, each with two majority-minority districts, another Senator voiced support for the bill that had a greater minority population in District 4: "I think that will be important to assure the maintenance and the viability of two seats that are, could be represented by African Americans." (Sen. Comm. Tr. 74).

[4] Hearing before the Committee on House and Governmental Affairs of the Louisiana House of Representatives, April 18, 1994. (Appendix C of Plaintiff's Motion for Preliminary Injunction and Amended Complaint).

[5] The letter was addressed to the Lawyers' Committee for Civil Rights Under Law, which has provided legal representation to the Black Caucus as an amicus in the litigation below.

In the 1994 trial, the State proffered many supposedly race-neutral reasons for Act 1, including a claim that District 4 was modeled after an older district (the "old Eighth"). The court refused, however, to credit the "old Eighth" and similar rationalizations: "The State's purported reliance on District Four's similarity to the 'old Eighth' is mere pretext." (U.S. J.S. App. 5a). The legislative transcripts also rebut any claim that the legislature had followed traditional districting standards: "I'm not going to wiffle-waffle with you on commonality interest [sic]. Specifically, that was the intent of why this plan was drawn because in my opinion the basic perception of the legislature is an interest in having two minority districts." (House Comm. Tr. 107).

2. The Court's Legal Conclusions

Based on the testimony and exhibits before it, the court found that the map of Act 1 alone "raises the inference that the Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly." This and other evidence showed that "the *fundamental factor driving Act 1 was race*." (U.S. J.S. App. 3a-5a.). In response to the court's finding of a racial gerrymander under *Shaw*, the State offered two putative compelling interests to justify Act 1: first, compliance with the Voting Rights Act, and second, the need to remedy past discrimination. The court found neither rationale persuasive.

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[6] The propriety of this letter is questionable in light of the Justice Department's own regulations, 28 C.F.R. § 51.22(b) (1993). But this is not the first case involving such involvement by the Justice Department. *See Johnson v. Miller*, No. 194-008, 1994 WL 506780 at *4-11(S.D. Ga. Sept. 12, 1994) (calling DOJ practices "disturbing"; observing that "in a notable faux pas, DOJ's second objection letter arrived at the Office of the Attorney General of Georgia only after members of the Georgia Black Caucus were already discussing it with the press.") The Assistant Attorney General's letter is attached as Appendix B at 4a-7a.

Regarding VRA compliance, the panel relied on this Court's precedents holding that Section 5 of VRA bars states subject to preclearance from allowing retrogression of minority voting strength, or from denying minorities the right to vote. Neither the United States nor Louisiana offered evidence that the failure to create two black districts would violate these tests. (U.S. J.S. App. 8a.). Nor could VRA Section 2 provide the missing compelling justification. (*Id.*). *Thornburg v. Gingles,* 478 U.S. 30 (1986), makes a compact minority population a necessary element of a claim under VRA Section 2. Relying on the State's own witnesses, the court found that District 4 of Act 1 is not compact within the meaning of *Gingles*, thus precluding compliance with VRA Section 2 as a compelling state of interest. (U.S. J.S. App. 8a). Likewise, on the issue of lingering discrimination, the court found insufficient evidence of the type of ongoing racial discrimination in Louisiana voting practices that might justify racial gerrymandering—a practice the court characterized as "[u]sing the disease as the cure." (U.S. J.S. App. 7a.).[7] In short, "when the State cannot, or has not, offered and supported an extraordinary justification for these questionable measures, the race-conscious enactments must fall." (U.S. J.S. App. 12a).

GROUNDS FOR AFFIRMANCE

Appellants' request that this Court note probable jurisdiction rests fundamentally on an out-of-context observation by the court that was not essential to its holding.

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[7] *See also Johnson v. DeGrandy*, 114 S. Ct. 2647, 2661 (1994) ("for all the virtues of majority-minority districts, they rely on a quintessentially race-conscious calculus aptly described as the 'politics of second best.' ").

Specifically, the United States relies on the court's statement that "race conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." (U.S. J.S. 10). If race-consciousness were all that was before it, the court would not have engaged in extensive fact-finding, using maps, demographics, and parish lines as guides. The court's inquiry revealed all of the indicia of a gerrymandering claim.

First, as in *Shaw*, was the shape of the District 4. Both the original District 4 in Act 42 and its progeny in Act 1 meander nearly the full length of Louisiana, splitting parishes while engulfing concentrations of black voters and exiling white voters to adjacent Districts. *See* Section I.B. *infra*. Careful examination of the lines drawn by District 4, as well as the racial composition of included and excluded areas, leads inevitably to one conclusion—race was the predominant if not exclusive consideration behind the formulation of Act 1's districts. The court correctly found that Louisiana's attempt to paper over the predominance of race by analogizing District 4 to the segregationist-era "old Eighth" was transparently pretextual. The old Eighth was used as a starting point precisely because it had a significant black population and then was transmogrified into a majority minority district by excluding white parishes (and parts of parishes) while adding other areas for manifestly racial reasons. *See* Section I.B.2. *infra*.

Appellants argue that the Voting Rights Act often requires "race-conscious redistricting," and that the "inevitable result" of the decision below "will be to chill voluntary compliance by the States." (U.S. J.S. 11-12). But the decision below neither depends upon "race-conscious redistricting," divorced from the facts here, nor is it in conflict with the decisions of the four other post-*Shaw* district court decisions.

Appellants pretend there is a conflict over the quantum of race-consciousness that triggers strict scrutiny but their real position is that, while "this Court [in *Shaw*] provided some general guidance on how to determine whether a state has a compelling interest in creating a majority-minority district," this case would enable the Court to provide more concrete guidance. (U.S. J.S. 17). To be sure, lower courts may need guidance in close cases; but here the evidence is so strong that the decision below can be affirmed based on *Shaw* and this Court's existing voting rights decisions.

Neither the United States nor Louisiana argue (nor can they) that a second majority minority district is necessary in Louisiana in order to avoid "retrogression." *Beer v. United States*, 425 U.S. 130, 141 (1976). The United States offers instead an interpretation of VRA Section 5 which imposes on covered states the task of proving that the failure to include any specific measure desired by DOJ officials would be "free from discriminatory purpose." (U.S. J.S. 19). The absence of such proof then would be allowed to substitute for actual proof of the three *Gingles* criteria under VRA Section 2, *Growe v. Emison*, 113 S. Ct. 1075, 1083 (1993), or the "strong basis in evidence" required in order to justify state-initiated affirmative action. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989); (U.S. J.S. 18).

This far-reaching assertion of Justice Department authority raises a variety of statutory interpretation and constitutional questions under Sections 5 and 2 referenced in this Court's previous decisions. *See* e.g., *Holder v. Hall*, 114 S. Ct. 2581, 259 (1994) (Thomas J. concurring in the judgment); *Chisom v. Roemer*, 111 S. Ct. 2354, 2375-76 (1991) (Kennedy J. dissenting); *United Jewish Org. of Williamsburg v. Carey*, 430 U.S. 144, 168 (1977) (Brennan J., concurring); *South Carolina v. Katzenbach*, 383 U.S. 301, 355 (1966) (Black J., concurring and dissenting). Such issues need not be reached in this case, however, because even the United States concedes that Louisiana must prove that it "reasonably believe[d] that its failure [to include a second majority minority district] would lead to a prima facie case of discrimination against it." (U.S. J.S. 18). Here, apart from generalized statements about long-since-cured voting rights abuses, neither the United States nor Louisiana offers any concrete evidence to support the prima facie case on which its theory might be predicated. On this record, therefore, the district court's factual findings are dispositive and its judgment should be affirmed.

I. THERE IS NO BASIS TO DISTURB THE DISTRICT COURT'S FINDING THAT DISTRICT 4 RATIONALLY CAN BE UNDERSTOOD ONLY AS AN EFFORT TO SEGREGATE VOTERS BY RACE

The district court found that, given the irregular shape of District 4 and the racial makeup of its districts, "District 4 is 'so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting.' *Shaw v. Reno*, 113 S. Ct. 2816 (1993). " (U.S. J.S. 3a). That unanimous factual finding is enough under a straightforward reading of *Shaw* to affirm the district court.

Appellants emphasize the court's statement that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." (U.S. J.S. 10-11; La. J.S. 12-13). But whatever might be read into that statement, and whatever disagreement among the lower courts one might perceive on *that* issue, this much is clear: *Shaw* requires that bizarre and unexplained districts be subjected to strict scrutiny. This Court's time is not well-spent re-examining whether the district court found the proper quantum of bizarreness to sustain a *Shaw* claim, especially given that District 4 is not, on its face, even a close call.

A. The *Shaw* Decision

In *Shaw*, this Court found that the districting scheme before it was so bizarre on its face that it was "unexplainable on grounds other than race." The constitutional violation was not the odd shape of the district itself, but instead what the oddly-shaped district indisputably proved—that the district boundaries were determined by race. The *Shaw* Court likened such bizarre districts to the "uncouth twenty-eight-sided" municipal boundary line at issue in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). As in *Shaw*, the statute in *Gomillion* was race-neutral—it contained no express racial classifications. However, the effect of transforming Tuskegee's boundaries from a square to a wild and unexplainable figure with twenty-eight sides was to remove from the city limits virtually all black voters while retaining its white voters. The net result of *Gomillion*'s facially race-neutral statute, therefore, was to segregate voters by race, and provide compelling evidence of unconstitutional and discriminatory intent.

The majority in *Gomillion* formally relied on the Fifteenth Amendment. *Id.* at 342-348. But Justice Whittaker's concurrence noted that unlawful segregation of voters into different districts also implicated the Equal Protection Clause. *Id.* at 348 (Whittaker, J. concurring). As the Court recognized in *Shaw*, *Gomillion's* progeny establish that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." *Shaw*, 113 S. Ct. 2826.

The contribution of *Shaw*, therefore, was simply to clarify one acceptable method of proving a kind of claim recognized under *Gomillion*. Under *Shaw*, a claim of racial gerrymandering can be shown by a bizarre district plan provided that the state can attempt to justify the district with genuine claims that the lines drawn can be explained by districting practices rather than race.

B. Under *Shaw*, District 4 Is So Bizarre On Its Face That It Can Be Explained Only As A Racial Gerrymander

The district court applied *Shaw* strictly and narrowly. The court first found that the district was so bizarre on its face as to compel the initial inference of a racial gerrymander. (U.S. J.S. App. 3a). It then allowed the State the opportunity to rebut that inference with justifications based on "traditional districting principles." *Shaw*, 113 S. Ct. at 2827. The State offered two principal justifications: that District 4 was unified by common interests, and that it was modeled after the old Eighth District. After reviewing the evidence, the district court made a simple credibility determination: one of the justifications was "clearly a *post hoc* rationalization," the other "mere pretext." (U.S. J.S. App. 5a). The Court found insubstantial the remaining flurry of excuses offered by the State. Each of these findings is reviewed below.

1. District 4 is Bizarre

The district court chided the State: after Act 42, "we called for major surgery. Act 1 is at best a cosmetic makeover." (U.S. J.S. App. 3a n.1). The concurring opinion stated that "it appears as if someone knocked over an inkwell somewhere around Waskom, Texas, spilling ink aimlessly across the map of Louisiana. There is simply nothing regular about the contours of District 4." (U.S. J.S. App. 15a). This characterization, like the "mark of Zorro" description in the court's first opinion, captures the essence of the racial gerrymander, confirmed by the map and the demographics of the territory District 4 encompasses (and equally important the territory it does not). The map of District 4 is contorted if seen from an overhead view of the entire state; a closer look at the boundary lines in the split parishes reveals that District 4 splits political subdivisions along questionable lines, as well.[8]

Just as the use of traditional districting principles can "defeat a claim that a district has been gerrymandered on racial lines," *Shaw*, 113 S. Ct. at 2827, so too a plan which jettisons these considerations is more likely a gerrymander. An examination of traditional districting factors underscores the oddity of Act 1's boundaries:

First, Act 1 pays little heed to political subdivisions. District 4 contains only three whole parishes. The boundary of District 4 racially divides four of the state's major cities—Shreveport, Baton Rouge, Lafayette, and Alexandria—all "in its efforts to capture sufficient pockets of African-American voters." (U.S. J.S. App. 16a; *See* App. 9a, 12a, 16a, 14a). The United States responds that every districting plan will inevitably split parishes, and that the court-imposed plan splits six parishes. (U.S. J.S. 16-17). But District 4 alone contains twelve split parishes of the sixteen parishes split in Act 1. Although there is no magic number of allowed split parishes, it is remarkable that District 4 splits 80% of the parishes it touches.

Second, District 4 is not compact. It spans a distance of over 250 miles, but in some connecting points is only a few miles across. Districts of regular geometric shape are generally considered compact, whereas districts that enclose small areas with long, meandering boundaries are not. Although there is no absolute measure of compactness, the wedge District 4 drives through the heart of Louisiana is far less compact than any of Act 1's other districts, or than any of the districts in the court's plan. As noted in the concurring opinion of Chief Judge Shaw, "[a] district that stretches over as much territory touching so many media and population centers, cannot be said to be compact." (U.S. J.S. App. 16a). The response of the Appellants is that the new District 4 is not as bad as the old: "Unlike old District 4, it does not meander over disconnected parts of the State, nor is it comprised of a series of 'fingers' reaching out from the core." (U.S. J.S. 14; *see also* La. J.S. 19 n.18). But surely old District 4—perhaps the most contorted district ever challenged in the federal courts—is not the proper benchmark for judging compactness.

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[8] The maps of the split parishes are attached as Appendix C at 8a-20a.

Third, District 4 is not united by a meaningful commonality of interest.[9] The district court's concurring opinion observed that

> District 4 includes North Louisiana English-Scotch-Irish, mainline Protestants, South Louisiana French-Spanish-German Roman Catholics, traditional rural black Protestants, and Creoles. The district encompasses North, Central, and South Louisiana, each of which has its own unique identity, interests, culture and history. The agricultural regions of District 4 include cotton, soybean, rice, sugar cane, and timber.

(U.S. J.S. App. 17a). In response, the United States claims that *parts* of District 4 encompass commonalities of interest: "The area along the Red River Valley is also an important economic region and the people in that region share common interests." (U.S. J.S. 6). But the inquiry must be whether the District generally—not merely a portion of it—is united by a common interest. As one legislator queried, "what local interest can Shreveport and Baton Rouge[10] have together? It just boggles the mind that we can sit in here and look at each other with straight faces and say that." (House Comm. Tr. 58-59).

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[9] As the court noted in its December 1993 opinion, "[a]ny able statistician who looks at enough statistical characteristics (multivariate analysis) can find something distinctive about any district." (U.S. J.S. App. 71a).

[10] Shreveport and Baton Rouge are more than 200 miles apart in District 4.

Fourth, the record shows that the drafters of Act 1 sacrificed all of the traditional districting standards in order to achieve a higher black population in District 4. While the United States suggests otherwise, Act 1 reflects "a single-minded pursuit of racial goals, with little or no consideration for other districting values." (U.S. J.S. 14). The most notable deviation from traditional standards—parish splitting—fenced 77% of the whites in the split parishes out of District 4, while corralling about 82% of the blacks in the split parishes into District 4. The odd appendages of District 4 also grasp at black voters. For example, the spur extending from District 4 at its northwest tip carves out a gnarled portion of Caddo Parish where 34,000 blacks live in the Shreveport area.[11] Just as in *Shaw*, "[the] State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Shaw*, 113 S. Ct. at 2827.

2. The State Failed to Justify Act 1 on Race-Neutral Grounds

The district court acknowledged that "if the state advances a legitimate, non-racial explanation for the plan's irregularity, then the factfinder must—as always—weigh the evidence on both sides and decide whether the plaintiff has met his burden of demonstrating that the plan's irrational shape reflects racial gerrymandering." (U.S. J.S. App. 58a). The State attempted to make such a showing when it argued that District followed the "old Eighth" District of elections past. Despite the court's finding that this contention was merely a post hoc rationalization,[12] the appellants revive the arguments that "the district resembles the Eighth District . . . from 1967-72" (U.S. J.S. 13), and "the plans in use between 1973 and 1992 also contained a district in the same general area." (U.S. J.S. 14). The facts are not quite so simple:

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[11] *See* App. 1a, 9a. This portion of Caddo parish is home to more than 10% of all of the blacks in the entire District 4.

First, District 4 does not approximate any particular configuration of the old Eighth. There are six entire parishes that were included in the old Eighth from 1967 to 1972 that are completely shorn from District 4. Likewise, two full parishes in District 4 are absent from the configurations of the old Eighth from 1973-92 (*Cf.* U.S. J.S. App. 110a with 111a-114a).

Second, District 4 follows or deviates from the old Eighth principally when doing so furthers the goal of increasing the proportion of black voters in the district. The record shows that District 4 adds enclaves of black population to the old Eighth, and jettisons parts from the old Eighth that are predominately white. Much of District 4, including the cities of Shreveport (in Caddo parish) and Lafayette (in Lafayette parish), was never included in *any* configuration of the old Eighth. (*See* U.S. J.S. App. 110a-114a). But District 4 sends out tentacles to these two cities and carves out parts of the parishes in which they sit. This sacrifice of adherence to the old Eighth picks up regions that are 67% black. (*See* Appendix A). On the other hand, Avoyelles parish, which is included in *every* configuration of the old Eighth, is conspicuously absent from District 4. Avoyelles parish is 72% white. (*See* U.S. J.S. App. 110a-114a; Def. Trial Ex. 4).

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[12] The argument of the United States on this score is schizophrenic. First, the United States contends that "the relevant inquiry under *Shaw* is whether a district is so bizarre *on its face* that it can be understood only as a racial gerrymander. Those terms mandate an *objective inquiry, not an inquiry into the legislature's subjective intent* based on after-the-fact statements." (U.S. J.S. 15) (emphasis added). Later, however, the United States describes the purpose of the old Eighth evidence as "to show that *the State was attempting to draw a majority-minority district in a way that was consistent with other traditional redistricting interests*." (U.S. J.S. 16) (emphasis added).

Third, one of the State's own witnesses—Mr. Koepp, who was charged with drawing the map of Act 1—revealed that the old Eighth was chosen for the purpose of concentrating black voters into another black district: "I was asked to look at the old Eighth District, the old Eighth District being the highest minority population district in the state other than the minority district number two." (7/21/94 Trial Tr. v.2, p. 11). This statement belies any claim that the old Eighth was chosen for the sake of tradition.

C. There Is No Split of Authority About Whether District 4 Is Subject to Strict Scrutiny

Having failed to disprove that District 4 is a presumptive racial gerrymandering under *Shaw,* or otherwise to justify its bizarre boundaries based on traditional districting principles, Appellants resort to hypothesizing a conflict among the post-*Shaw* district court decisions about the lower court's statement here that "race-conscious redistricting, while not always unconstitutional is always subject to strict scrutiny." (U.S. J.S. 10-12). No doubt there are semantic differences in the formulations employed by the various decisions, as noted by the opinion in *Johnson v. Miller*, 1994 WL 506780, at *12-14. These different verbal formulations were not, however, dispositive in this or the other cases.

All of the other district courts but one applied strict scrutiny, and none conflicts with the holding of *Shaw* that a district so bizarre on its face that it can be explained only as a racial gerrymander is subject to strict scrutiny. The only way for this Court to reach the question "whether the intentional creation of a majority-minority district is always subject to strict scrutiny" (U.S. J.S.(I)) is first to conclude that the district court erred when it found that District 4 was bizarre enough to sustain a *Shaw* claim. Copious geographic and demographic evidence supports the finding by the court on this issue.[13] This alone provides ample reason to affirm the district court on this issue.

II. ACT 1 IS NOT JUSTIFIED BY A COMPELLING GOVERNMENT INTEREST

Because Act 1 must be subjected to strict scrutiny, the law will be sustained only if supported by a compelling state interest.[14] In the district court, the Appellants presented two possible compelling justifications for Act 1 and its creation of a second majority-minority district: compliance with the Voting Rights Act, and remediation of past discrimination. The district court recognized that either justification can, in appropriate cases, serve as a compelling interest, but recognized that this is not such a case. (U.S. J.S. App.7a-10a).

A. The Voting Rights Act Does Not Require Louisiana to Create a Second Majority-Minority District

A State can show a compelling interest in complying with either Section 2 or Section 5 of the VRA. The district court found that the Appellants did not show that Louisiana's actions were required by either section. Appellants argue that the district court "erred in requiring the state to prove an actual violation of federal law as a predicate for drawing a majority-black district." (La. J.S. 20; *see also* U.S. J.S. 18). Appellants contend that there need be only a "strong basis in evidence" to believe that their actions would violate federal law, "a standard that is satisfied if the State reasonably believes that its failure to take the measure would lead to a prima facie case of discrimination against it." (U.S. J.S. 18) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 292-93 (1986)). Appellees do not agree that a tenuously-supported belief that a plan will violate the Voting Rights Act, or will be denied preclearance by the Attorney General, is enough to establish a compelling interest.

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[13] And as with Act 42, voluminous direct evidence of race-based intent supports the court's findings.

[14] As the United States points out, the court never reached the narrow tailoring question because it found no compelling justification for Act 1.

But even assuming, *arguendo*, that a mere reasonable belief would suffice, the State must still make *some* showing to support its claim. The State must make a "prima facie case of a constitutional or statutory violation." *Croson*, 488 U.S. at 500. Neither Appellant presented any evidence that would meet even the standard they propose.

1. Section 5

Section 5 of VRA imposes on covered states an affirmative duty to avoid retrogression of minority voting strength, and prohibits plans that have the purpose or effect of denying or abridging the right to vote on racial grounds. The district court found that:

> Neither the State nor the Department of Justice offered any evidence suggesting that failure to create a second majority-minority district would either be a retrogression of minority strength or have an illegal purpose or effect. Not surprisingly, we can find no support for such a claim either.

(U.S. J.S. App. 8a). The Justice Department bristles at the notion that the State would be required to show that a feared denial of preclearance under Section 5 would be "legally valid". (U.S. J.S. 19). Appellees do not concede that the Justice Department's say-so alone, especially when contrary to the statute and this Court's decisions, is enough to provide a compelling interest to justify racial segregation: *Shaw* recognized only that a State may "have a very strong interest in complying with federal antidiscrimination laws that are constitutionally *valid as interpreted and as applied*." 113 S. Ct. at 2830 (emphasis added). The record demonstrates that the State had *no reason at all*, let alone a reasonable basis, to believe that the Justice Department would lawfully deny preclearance to a plan with only one minority district.

One majority-minority district out of seven yields greater minority voting power than a single district out of eight, and could not constitute "retrogression" within any reasonable definition of the term. *See Beer v. United States*, 425 U.S. 130, 141 (1976) ("a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise" does not violate Section 5). Appellants do not attempt to challenge that finding in this Court.[15] Appellants instead claim that the State reasonably believed that it could not show to the Attorney General the requisite lack of discriminatory purpose if it did not create a second majority-minority district. (U.S. J.S. 19; La. J.S. 23).

The only evidence upon which the appellants rely is the DOJ's refusal to clear the BESE board districting, which created only one majority-minority district out of eight. The conclusion: because the State did not prove a lack of discriminatory intent with the BESE board, it would be unable to do so in the case of the newly-reduced seven district plan.

Nowhere do they explain why the State was unable to prove lack of discriminatory purpose in the eight-number BESE board redistricting, much less show how that failure would foredoom the seven-seat congressional redistricting.

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[15] The Justice Department below took a startling position: that because Act 42 provided two majority-minority districts, any later plan would constitute retrogression if it did not also allow two such districts—*even though Act 42 was declared unconstitutional*. (*See* 7/22/94 p.m. Trial Tr. p. 44. This position is directly contrary to DOJ's own regulations, *see* 28 C.F.R. § 51.54(b) (1993), and has since been abandoned.

"Purpose" suggests an inquiry into the reasons for a change, *see City of Richmond v. United States*, 422 U.S. 358 (1975); and yet appellants do not point to a shred of evidence of record that shows that anyone on behalf of the State acted for illegitimate reasons. Nor do they suggest that there are not valid reasons for implementing a plan with only one black majority district but with generally compact, racially-balanced districts that unite common interests. *See id.* at 375 (no discriminatory purpose if there are "objectively verifiable, legitimate reasons" for action). If anything, the record shows that the legislature bent over backward to increase minority voting power—not just to satisfy the extreme demands of the Justice Department, but to satisfy the strange coalition between the "two and nothing less" faction and Republican legislators. Unless the Justice Department would infer a discriminatory purpose merely from the failure to maximize the number of safe black seats without regard to other considerations, it is unclear how the BESE board redistricting or the number of black-controlled districts, standing alone, is relevant in any way to discriminatory purpose.

At bottom, the State relies on the bare assertion that it could not prove the lack of discriminatory purpose as defined by DOJ—despite a well-developed record that proves precisely the opposite. An unsupported assertion cannot create a compelling interest. Without any evidence to support the state's fear, and plenty of evidence to assuage it, all the State has to show a compelling interest is one thing: a letter from DOJ, *written before DOJ had seen any evidence relating to the new redistricting*, baldly asserting that the State had reason to believe it could not gain preclearance under Section 5 without creating another majority black district. Surely such a procedurally irregular letter, manifestly prejudging the issues, cannot form the basis for a compelling state interest justifying the resegregation of Louisiana's voters by race.

2. Section 2

Section 2 of VRA prohibits any change in voting practice or procedure that dilutes the vote of a minority. *Thornburg v. Gingles*, 478 U.S. 30 (1986), established the three requirements of a vote dilution claim: a politically cohesive minority, a bloc-voting majority that consistently can beat minority-supported candidates, and a reasonably compact minority population. The district court found that the minority population outside of District 2 in Louisiana was not compact within the meaning of *Gingles*, and so any Section 2 challenge against a redistricting plan with only one majority-minority district would necessarily fail.

In response, the appellants suggest that because District 4 is as compact as the old Eighth—a district gerrymandered to assure the election of Gillis Long—it satisfies the *Gingles* criterion. (U.S. J.S. 19). But Louisiana admits in its Jurisdictional Statement that the old Eighth was not compact. (La. J.S. 19). And the district court found that District 4 was not compact enough to save the district from strict scrutiny. It would be odd indeed to suggest that Section 2 would *require* a state to draw a district that is presumptively unconstitutional. Where, as here, strict scrutiny has been triggered by a non-compact district, the majority population encompassed within that district must not be compact enough to qualify as a district that is *required* under Section 2.

In any event, the black population within the district is hardly compact. The District is 55% black only because it encompasses parts of Shreveport, Lafayette, Alexandria, and Baton Rouge—regions each densely populated with blacks, but in some cases over two hundred miles apart. Accord, *Johnson v. Miller*, 1994 WL 506780 at *33 ("The populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties . . .. DOJ's insistence that they are 'compact' renders the term meaningless.").

B. The State Failed to Show Discrimination In Past Voting Practices

The State insists that District 4 is necessary to "overcom[e] past racial discrimination against the State's black citizens." (La. J.S. 21). But this Court has held that such vague, generalized claims of "societal discrimination" are insufficient to trigger race-based remedial action by the States. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. at 505 (rejecting the claim that "past societal discrimination alone can serve as the basis for rigid racial preferences"); *id.* at 500 (refusing to accord weight to "conclusory" allegations of racial discrimination). Under this Court's precedents, therefore, the district court was correct to conclude that "[w]ithout concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies, we cannot agree that the resegregation of Louisiana by racially configured voting districts is warranted." (U.S. J.S. 10a).

The United States contends that "the State had a compelling interest in ameliorating the effect that racially polarized voting has had on the opportunity for minority voters in Louisiana to elect the candidates of their choice." (U.S. J.S. 20). This is indeed more particular than the claims of Louisiana. But all the United States can say on this point is that "the State had every reason to believe that unless it created an additional district in which blacks constituted a majority, bloc voting by whites would preclude minority voters from having any realistic chance to elect a second representative of their choice." (*Id.*). The argument thus is circular, and takes the form "the State has a compelling interest in creating two safe black districts, because if it didn't, there wouldn't be two safe black districts." Without the link to why past discrimination in voting *requires* two safe black districts, the argument gets nowhere.

III. APPELLANTS' OTHER ARGUMENTS ARE WITHOUT MERIT

The State has mischaracterized the record and raised a flurry of other issues that have no merit. These issues deserve only brief attention.

A. The Plaintiffs Have Standing to Challenge Act 1

The State contends that the plaintiffs do not have standing to challenge Act 1, because the court below did not find that they had suffered an concrete harm, or that a decision in their favor would offer them a remedy. The opinion of the court in *Shaw* rejected the claim of the dissent that racial gerrymandering is not cognizable without a showing of vote dilution:

> [c]lassifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases. . . .
>
> . . . [Racial gerrymandering] reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. Justice Souter does not adequately explain why these harms are not cognizable under the Fourteenth Amendment.

113 S. Ct. at 2828 (citation omitted). *Shaw* thus establishes that the plaintiffs as Louisiana voters have suffered a harm cognizable under the Fourteenth Amendment. *See* also *Shaw v. Hunt*, No. 92-202-Civ-5-BR, 1994 WL 449347 at *10

(E.D.N.C. Aug. 1, 1994).[16] *Cf. Batson v. Kentucky*, 476 U.S. 79 (1986).

B. The District Court Did Not Employ Irregular Trial Procedures

The State contends that the district court abused its discretion by not permitting the Defendants to prepare for trial. (La. J.S. 27). The State provides no reason to believe that trial procedures were improper other than a bald assertion that the defendants were prejudiced by an early trial date. An unsupported assertion is insufficient to preserve error in this Court.

Equally unavailing is the argument that the court shifted the burden of proof by ruling for the plaintiffs before they put any witnesses on the stand. (La. J.S. 28). The State's argument is a dressed-up challenge to the sufficiency of the evidence. It is beyond cavil that live witnesses are not the only method (or perhaps even a good method) of proving a gerrymandering claim. Plaintiffs presented voluminous evidence—including maps, legislative transcripts, and demographic statistics—to the district court. This overwhelming evidence, in addition to the defendant's evidence, was surely adequate to allow a reasonable judge to find that the plaintiffs had presented a winning gerrymandering claim under the Fourteenth Amendment.

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[16] Ed Adams, who is black, has suffered a more concrete harm which was remedied by the district court's plan. The demographic statistics of the parishes split between District 4 and District 5 show that the racial gerrymandering of Act 1 "whitened" District 5. (*See* Appendix A.) The district court's plan increased the black population of District 5, in which Ed Adams lives, by 23% over Act 1. (*Cf.* U.S. J.S. App. 36a with Def. Trial Ex. 4.)

CONCLUSION

This case was properly decided under established law and the facts presented in the case. Under *Shaw v. Reno*, the plaintiffs showed that Act 1 could be explained only as the segregation of voters by race. The appellants failed to present any evidence that would allow them to pass the demanding standard of strict scrutiny. The judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: October 28, 1994

APPENDIX

APPENDIX A

(From Appendix A, Tab 6 of Plaintiff's Motion for Preliminary Injunction)

RACIAL TABULATION OF COMPONENTS OF SPLIT PARISHES

Parish	District #	Total Reg. Vot.	Total Reg. Wht. (%)		Total Reg. Blk. (%)	
Caddo	4	50,847	16,404	32.3%	34,069	67.0%
	5	72,668	65,588	90.3%	6,455	8.9%
Red River	4	2,427	695	28.6%	1,713	71.3%
	5	3,570	3,153	88.3%	413	11.6%
Natchitoches	4	13,826	7,246	52.4%	6,376	46.1%
	6	6,708	5,850	87.2%	770	11.5%
Rapides	4	28,499	14,316	50.2%	13,943	48.9%
	6	40,432	36,971	91.4%	3,162	7.8%

APPENDIX A
Continued

Parish	District #	Total Reg. Vot.	Total Reg. Wht. (%)		Total Reg. Blk. (%)	
Pointe Coupee	4	6,878	3,137	45.6%	3,739	54.4%
	6	7,672	5,762	75.1%	1,905	24.8%
East Baton Rouge	4	67,057	17,728	26.4%	49,053	73.2%
	6	132,434	121,651	91.9%	9,815	7.4%
St. Landry	4	36,447	18,687	51.3%	17,682	48.5%
	7	12,187	10,186	83.6%	1,956	16.0%
Lafayette	4	17,433	5,607	32.2%	11,784	67.6%
	7	71,825	64,661	90.0%	6,683	9.3%

APPENDIX A
Continued

Parish	District #	Total Reg. Vot.	Total Reg. Wht. (%)		Total Reg. Blk. (%)	
St. Martin	4	18,137	10,617	58.5%	7,477	41.2%
	3	7,766	6,899	88.8%	847	10.9%
Iberville	4	17,129	8,122	47.4%	8,999	52.5%
	3	2,891	2,831	97.6%	59	2.0%
Ascension	4	7,829	2,504	31.9%	5,309	67.8%
	3	26,999	24,833	91.9%	2,076	7.7%

APPENDIX B

April 20, 1994

VIA FACSIMILE TRANSMISSION

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Robert B. McDuff, Esq.
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Re: Hays v. Louisiana, No. 92-CV-1522 (W.D. La.)

Dear Ms. Wright and Mr. McDuff:

This responds to your April 15, 1994, letter regarding the Hays v. Louisiana litigation, involving the challenge to Louisiana's 1992 congressional redistricting plan. We welcome your invitation for the Department of Justice to continue to work together with the Louisiana Legislative Black Caucus, which you represent, in our mutual roles as amicus curiae in this litigation.

We are aware that the Louisiana legislature is now in a special session called by Governor Edwards to consider the enactment of a new congressional redistricting plan in light of the ruling in Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), that Act 42, the congressional redistricting plan adopted in 1992, is unconstitutional and cannot be used in the 1994 elections. While we cannot comment on any particular redistricting plan under consideration, see Procedures for the Administration of Section 5, 28 C.F.R. 51.22, we believe some general observations can be made in light of the evidence adduced during the Hays case, and the general framework of the court's ruling.

In our supplemental brief filed in Hays in August 1993, we argued that the Voting Rights Act provides Louisiana with a compelling interest in drawing two congressional districts in which black voters would have an opportunity to elect candidates of their choice. That is still our view. In undertaking its congressional redistricting, Louisiana had a compelling interest in satisfying its burden of proof under Section 5 of the Voting Rights Act. Avoidance of retrogression of minority voting strength would justify the retention of the black-majority district in New Orleans. But the state also had a strong interest in adopting a plan that would not give rise to an inference of discriminatory purpose, so as to satisfy the "purpose" prong of Section 5. We believe the state was justified in concluding that it would have been unable to meet that burden if it adopted a plan with only one black-majority district, in light of the Attorney General's 1991 objection to the state's plan for the Board of Elementary and Secondary Education. That circumstance, together with the evidence of racially polarized voting in Louisiana and the availability of readily discernible alternatives for a reasonably compact second majority black congressional district, shows that the state had reason to believe a plan with two black-majority districts was necessary to obtain Section 5 preclearance.

We also argued that compliance with Section 2 of the Voting Rights Act gave the state a compelling interest to draw two black-majority congressional districts. Evidence in the record demonstrates that the three preconditions under Thornburg v. Gingles, 478 U.S. 30 (1986), are satisfied, giving Louisiana a strong basis for taking action to avoid a Section 2 violation. The plaintiffs' own plans, developed and presented at trial by Dr. Weber, demonstrate that the black population is sufficiently numerous and geographically compact such that two reasonably compact districts with black voting age population majorities can be drawn. In addition, there is uncontradicted evidence that voting is racially polarized in congressional elections, sufficient to satisfy the second and third Gingles preconditions.

The district court's ruling in Hays does not alter these judgments. In finding the 1992 plan unconstitutional, the district court assumed arguendo that the interests advanced by Louisiana were compelling, but then ruled that District 4 was not "narrowly tailored" to further those interests. The court's ruling is based on its conclusion that a more compact second black-majority district could be drawn and that a district with a lower percentage of black voting age residents would still provide black voters with a realistic opportunity to elect candidates of their choice. We recognize that the state has appealed the ruling in Hays and we concur in the view that Hays is wrongly decided. In fact, we are actively considering what role, if any, we will play in the appeal. Nevertheless, the court's acknowledgement that a more compact district can be drawn supports our position that Louisiana has a compelling justification to create two black-majority districts.

In sum, we believe that, under the totality of circumstances existing in Louisiana, it remains reasonable to conclude that the Voting Rights Act requires the state to devise a congressional redistricting plan with two black-majority districts. Moreover, such a plan can be devised in a way that would not run afoul of the Supreme Court's ruling in Shaw v. Reno, 113 S. Ct. 2816 (1993), or the district court's ruling in Hays. We recognize that there likely are a variety of plans that would accomplish those objectives and that the choice of which plan to adopt is a matter best left to the discretion of the legislature under our federal system.

Of course, the state must seek preclearence under Section 5, either from the Attorney General or from the District Court for the District of Columbia, of any new plan before it may be implemented in the 1994 elections. Should the state seek administrative preclearence through the Attorney General, we stand ready to conduct our review as expeditiously as possible, so that the state can proceed with its regular election schedule, which provides for candidate filing to occur in July.

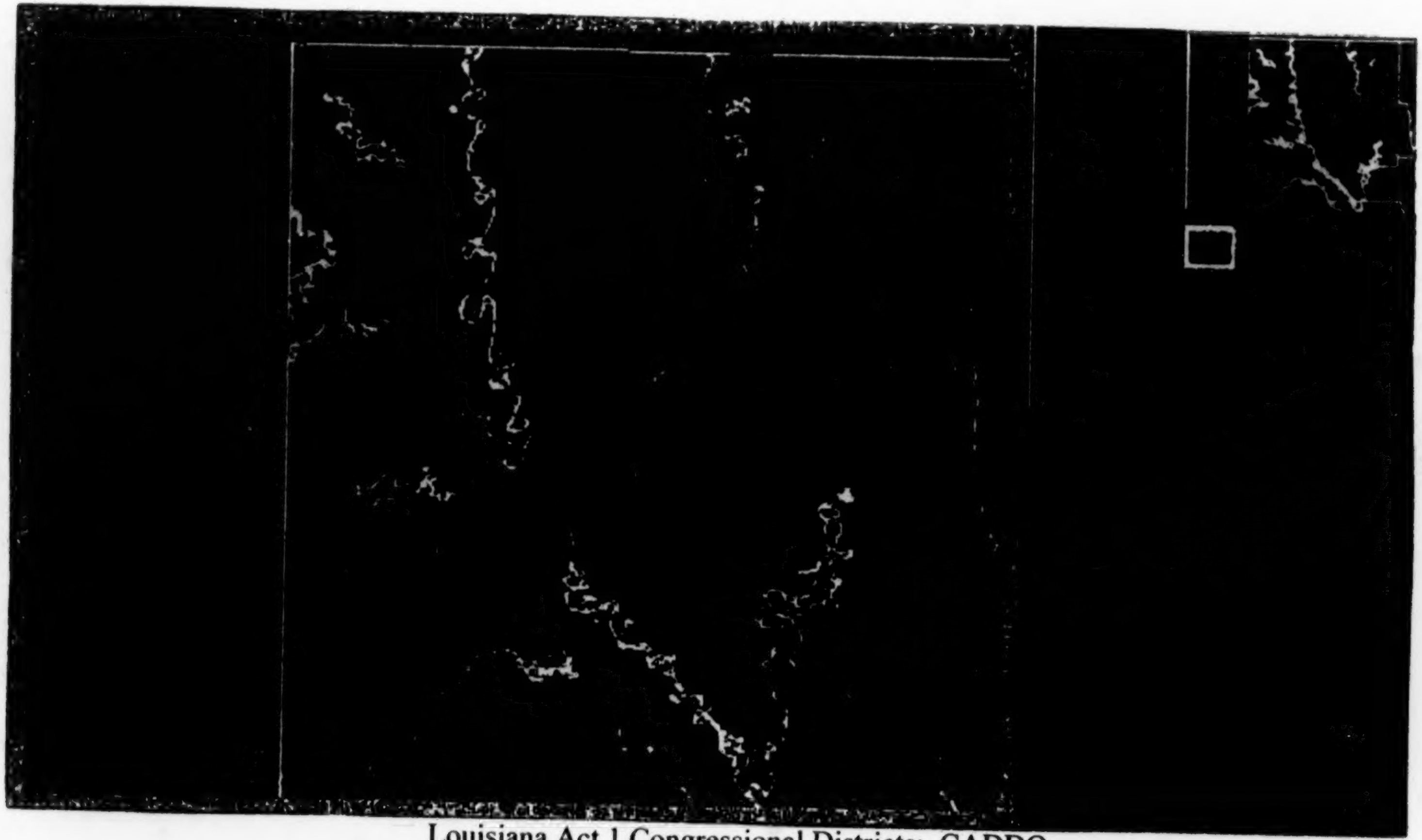
I trust this letter provides a basis for us to continue to work together to resolve the Hays litigation in a way that ensures that the voting rights of the citizens of Louisiana are fully protected. If you have any further questions, you should contact Steven H. Rosenbaum, Chief of the Voting Section (202-307-3143).

Sincerely,
/s/
Deval L. Patrick
Assistant Attorney General
Civil Rights Division

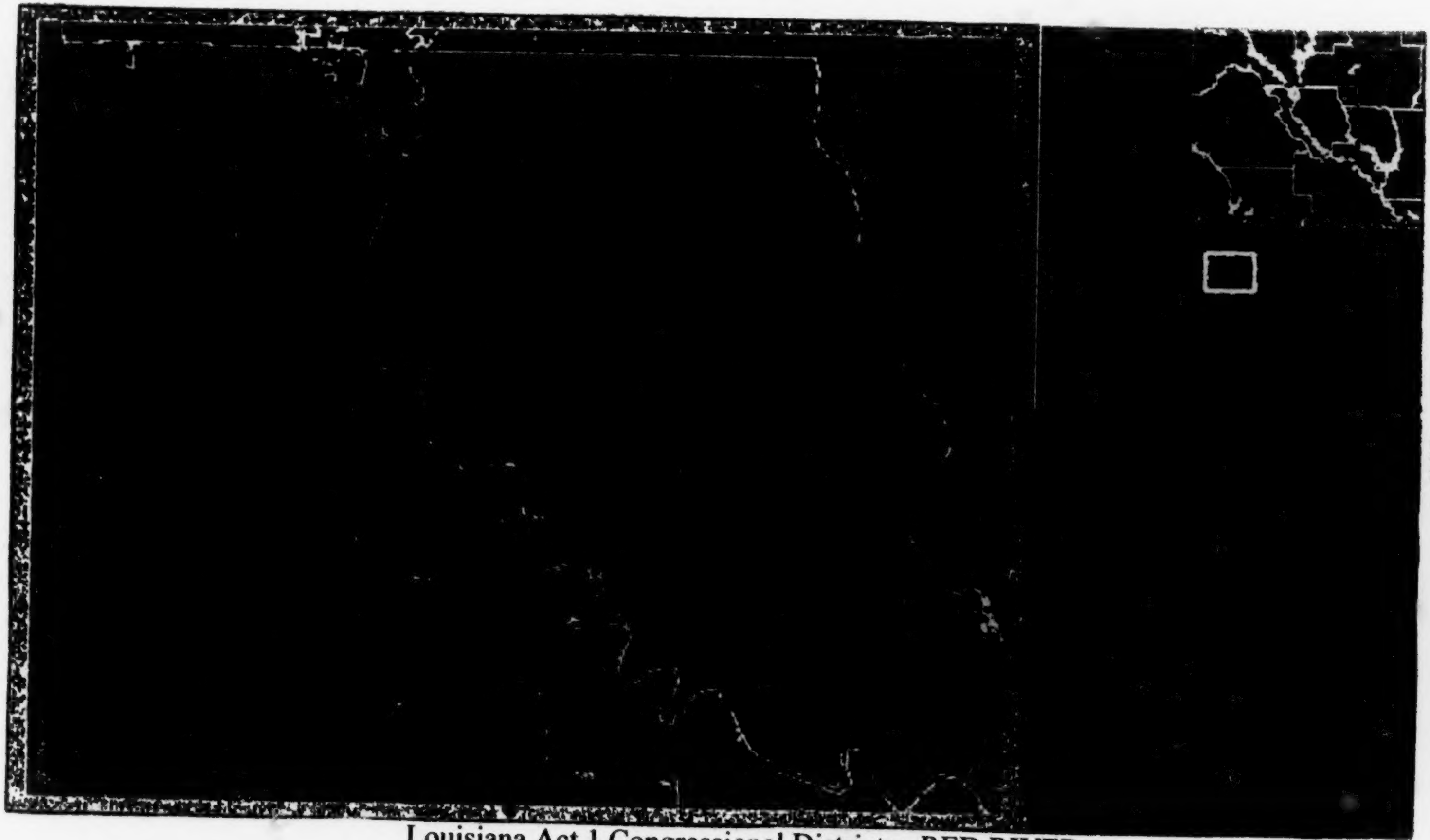
APPENDIX C

(From Appendix A, Tab 7 of Plaintiff's
Motion for Preliminary Injunction)

Bold yellow lines indicate Parish boundaries.

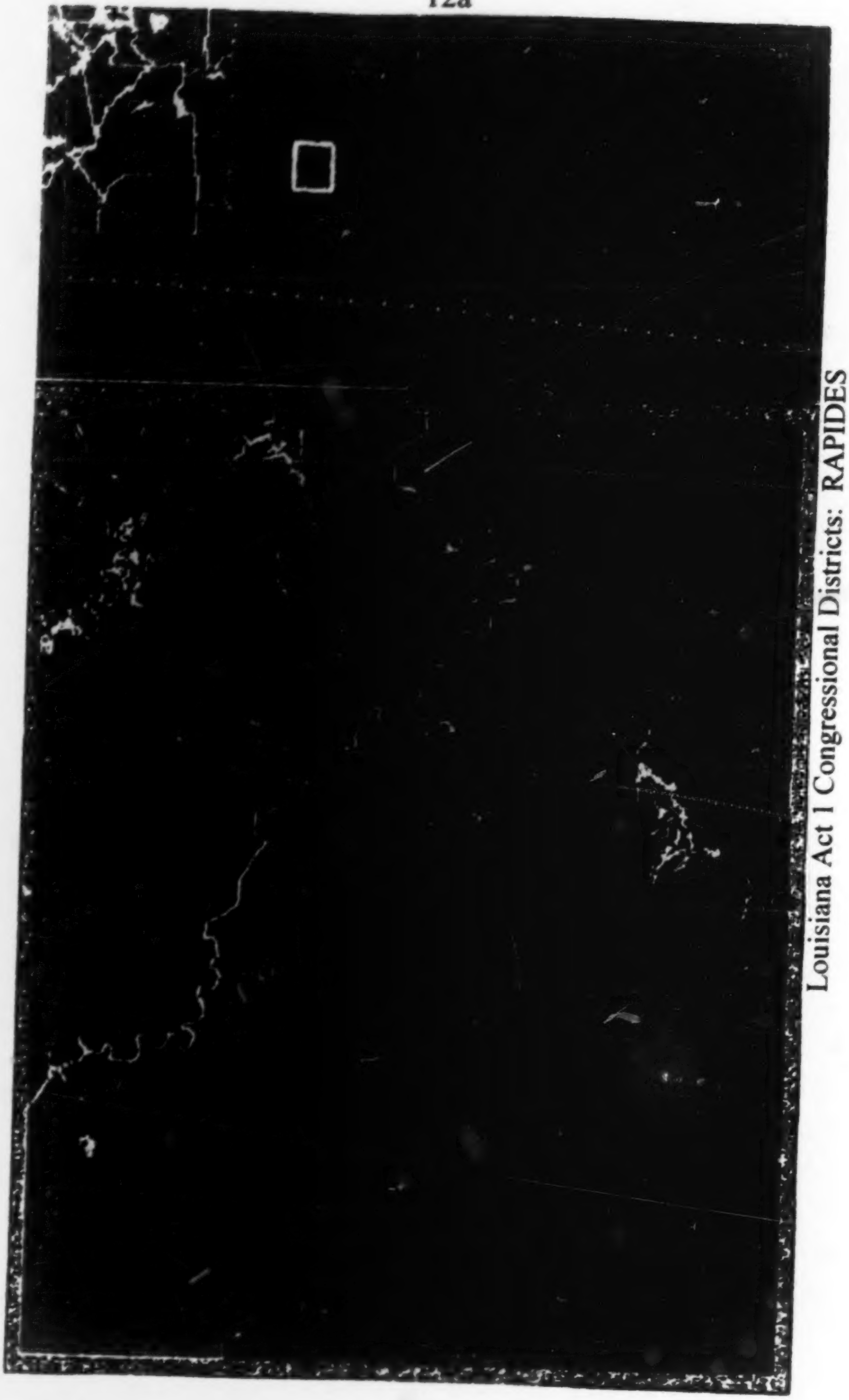


Louisiana Act 1 Congressional Districts: CADDO



Louisiana Act 1 Congressional Districts: RED RIVER

Louisiana Act 1 Congressional Districts: NATCHITOCHES



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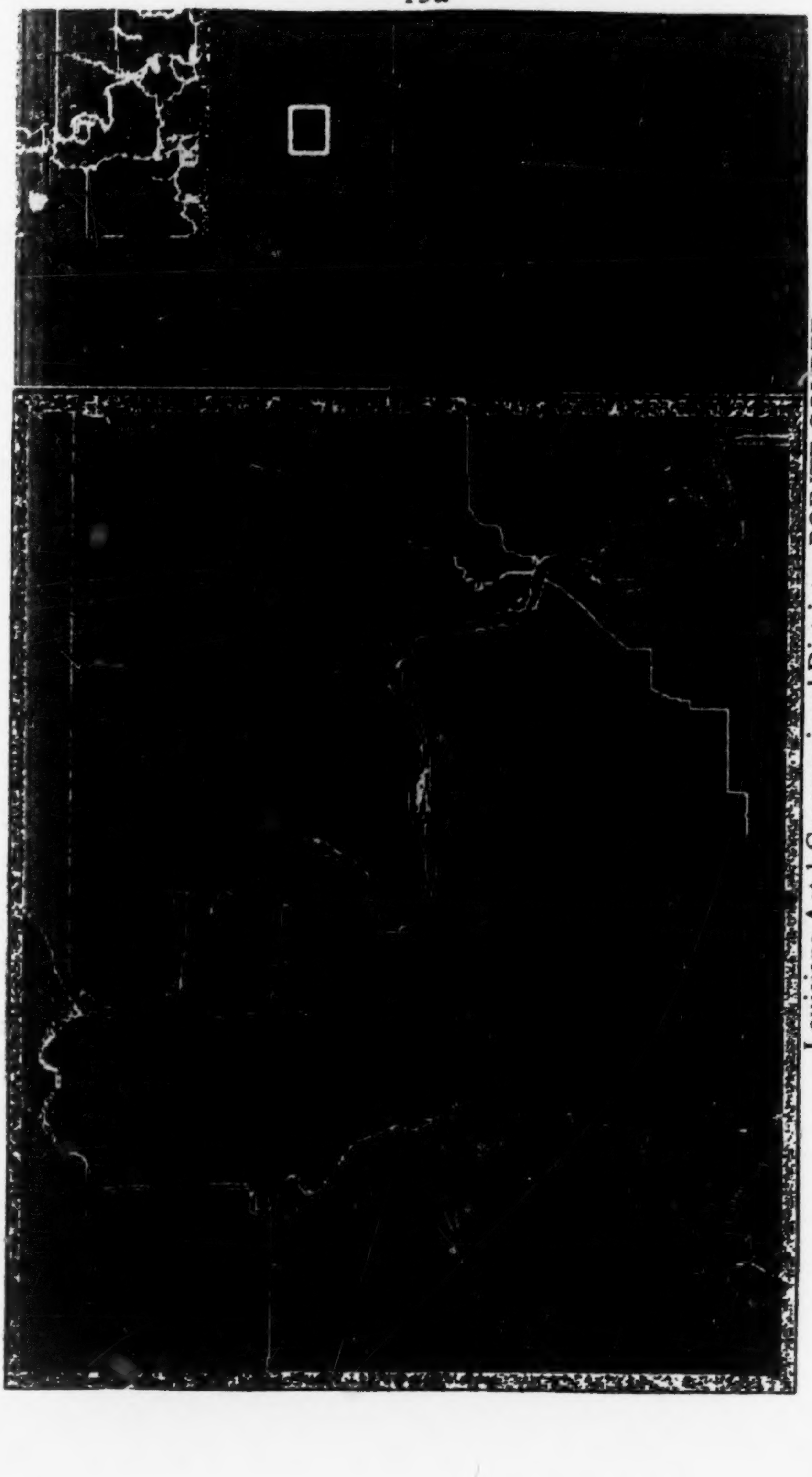

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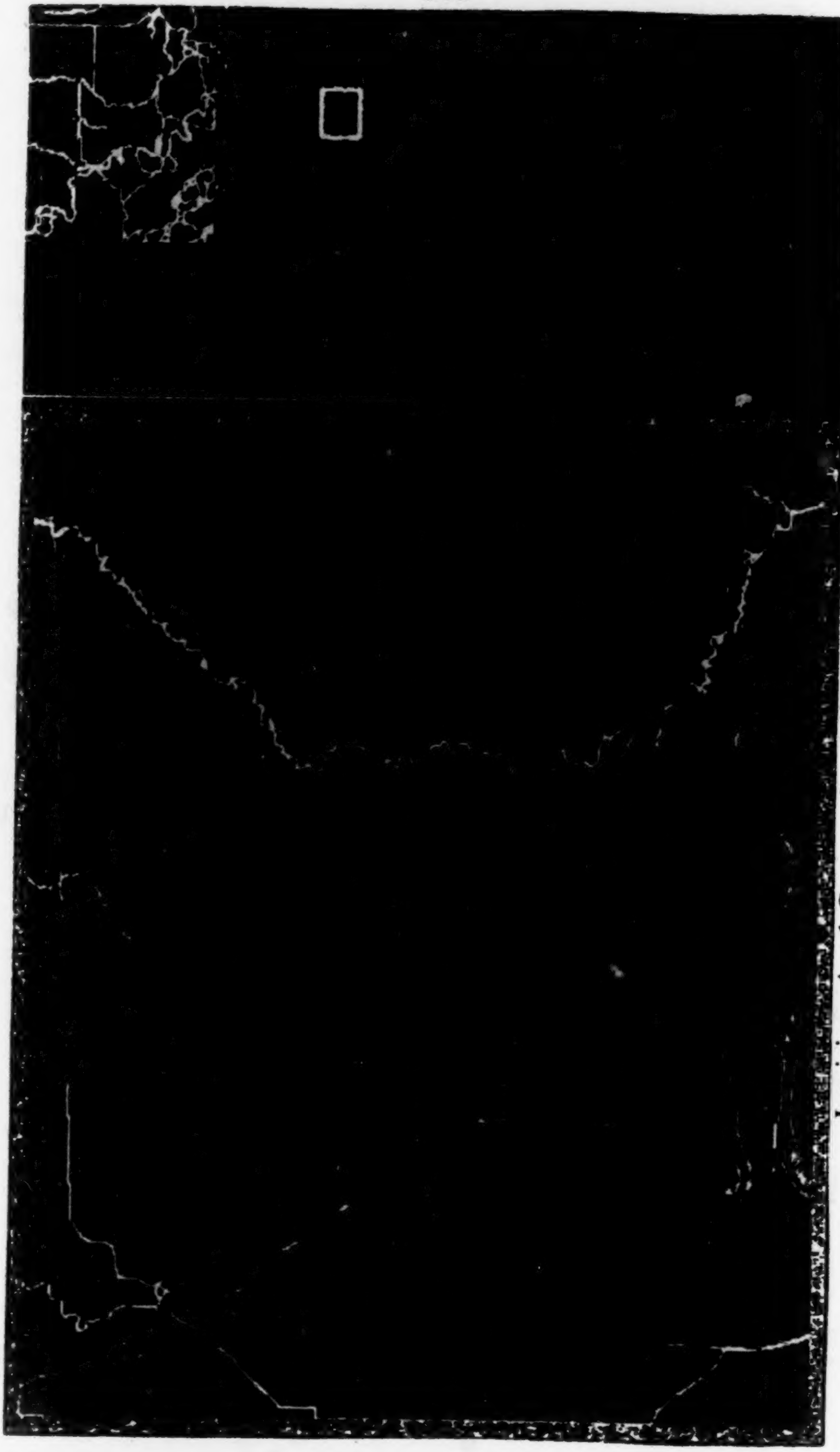

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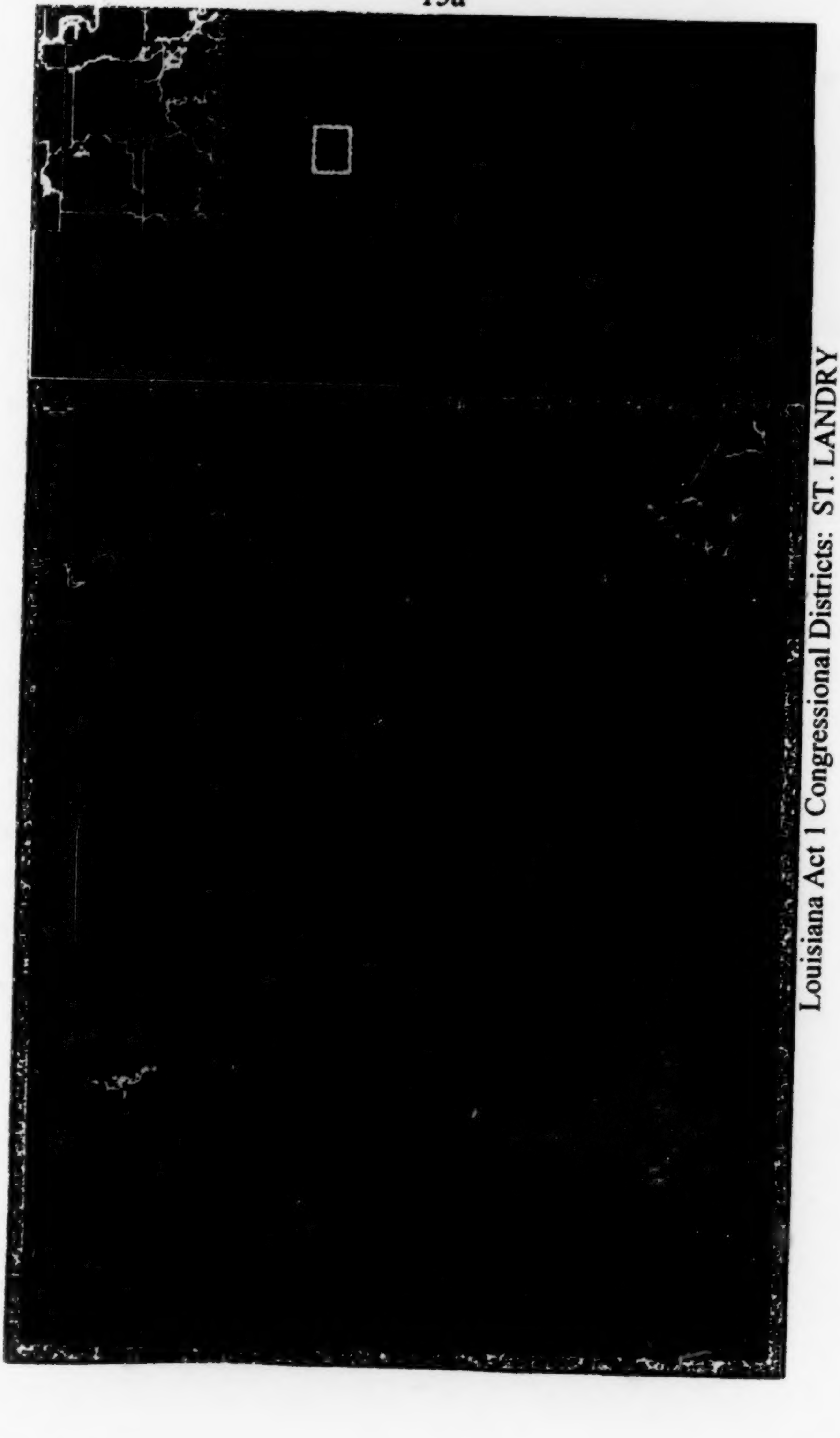

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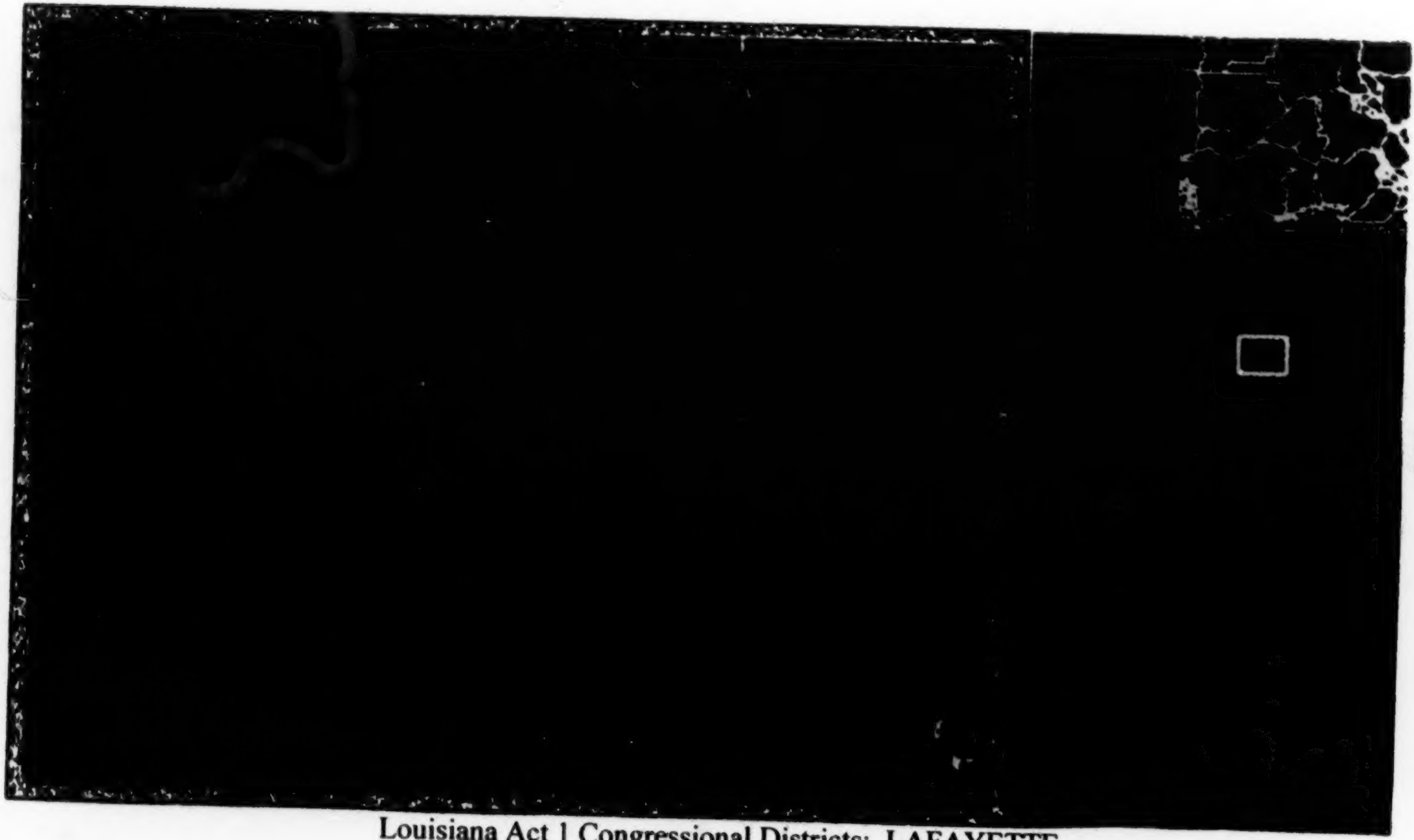

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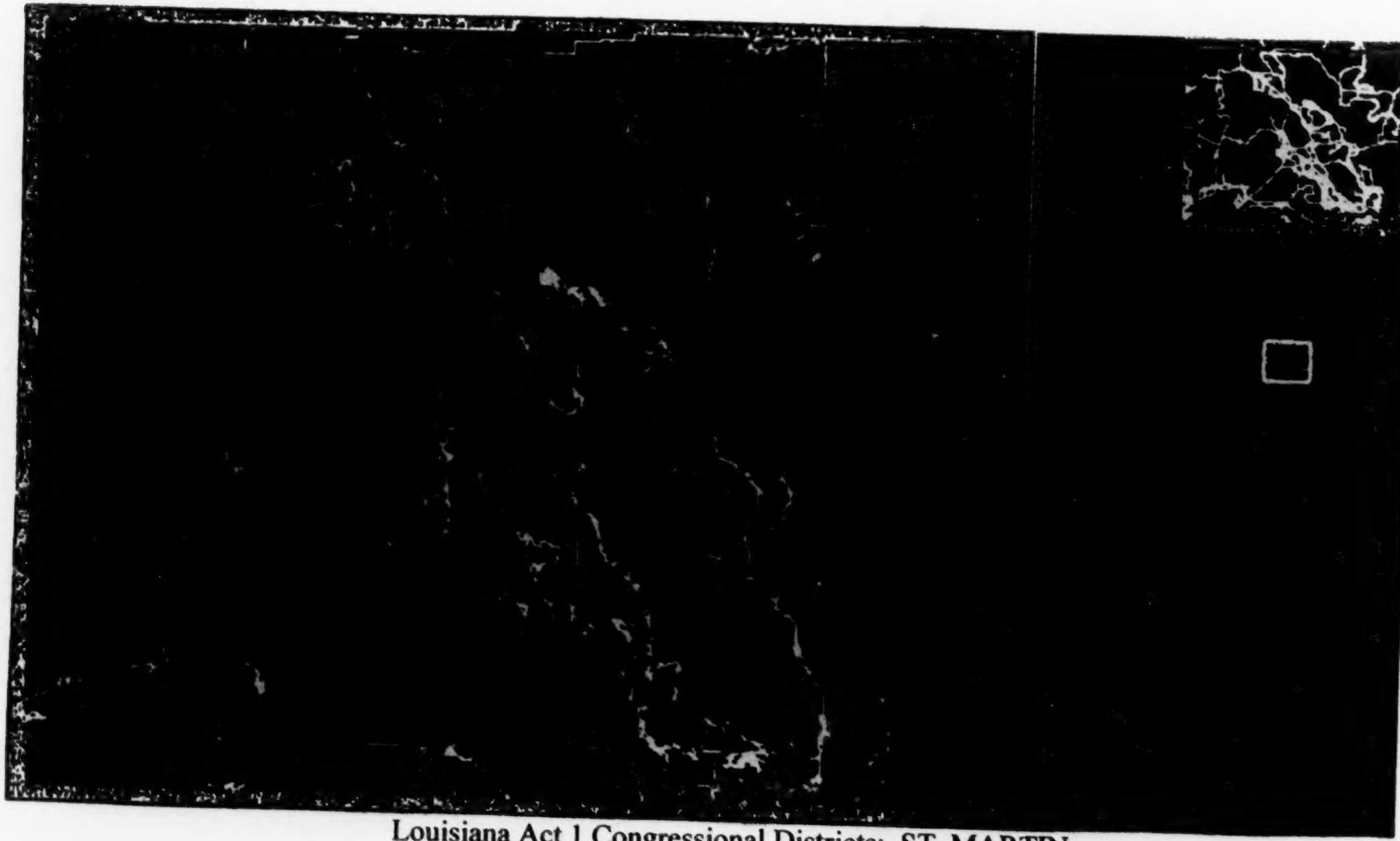

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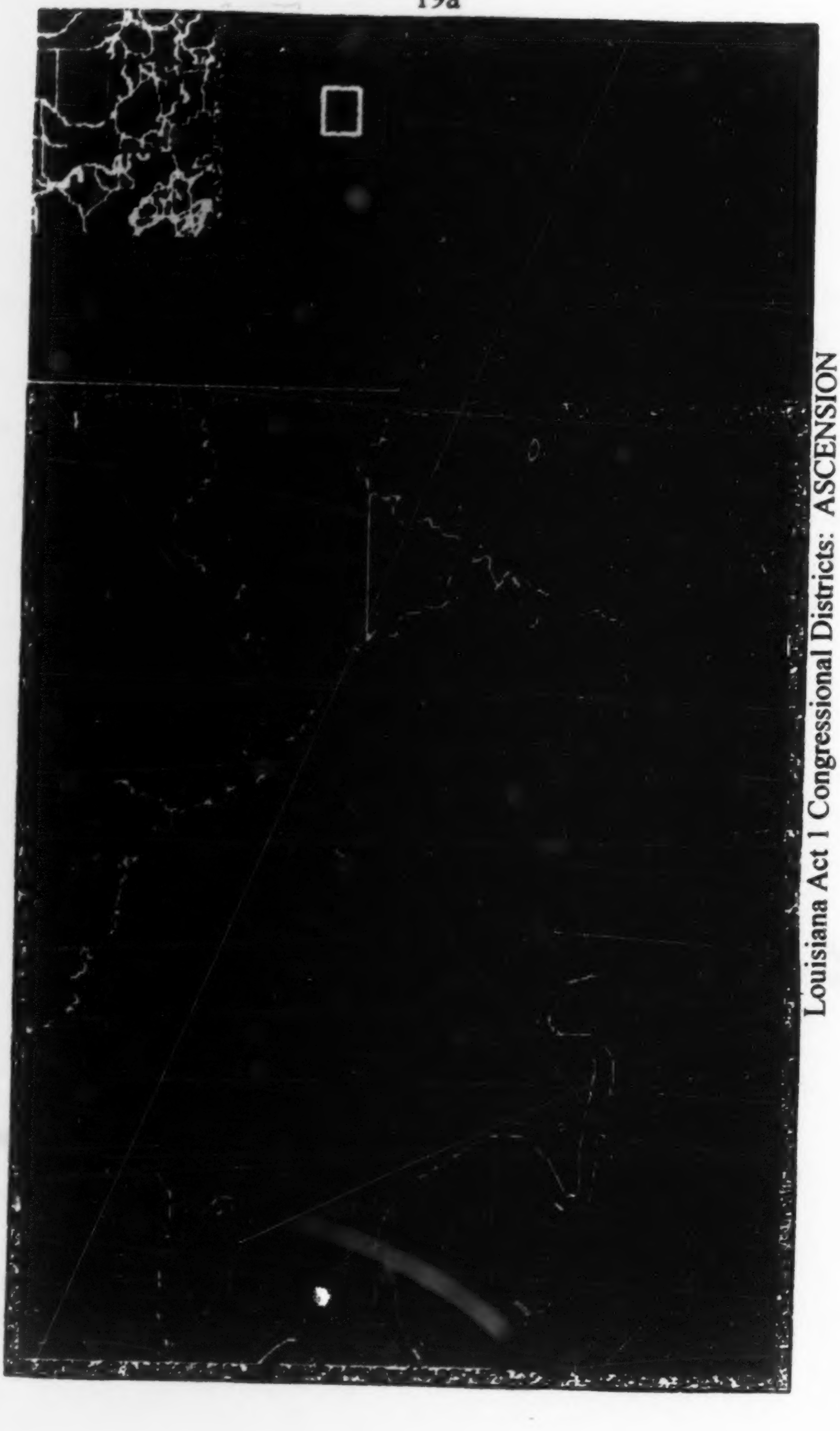

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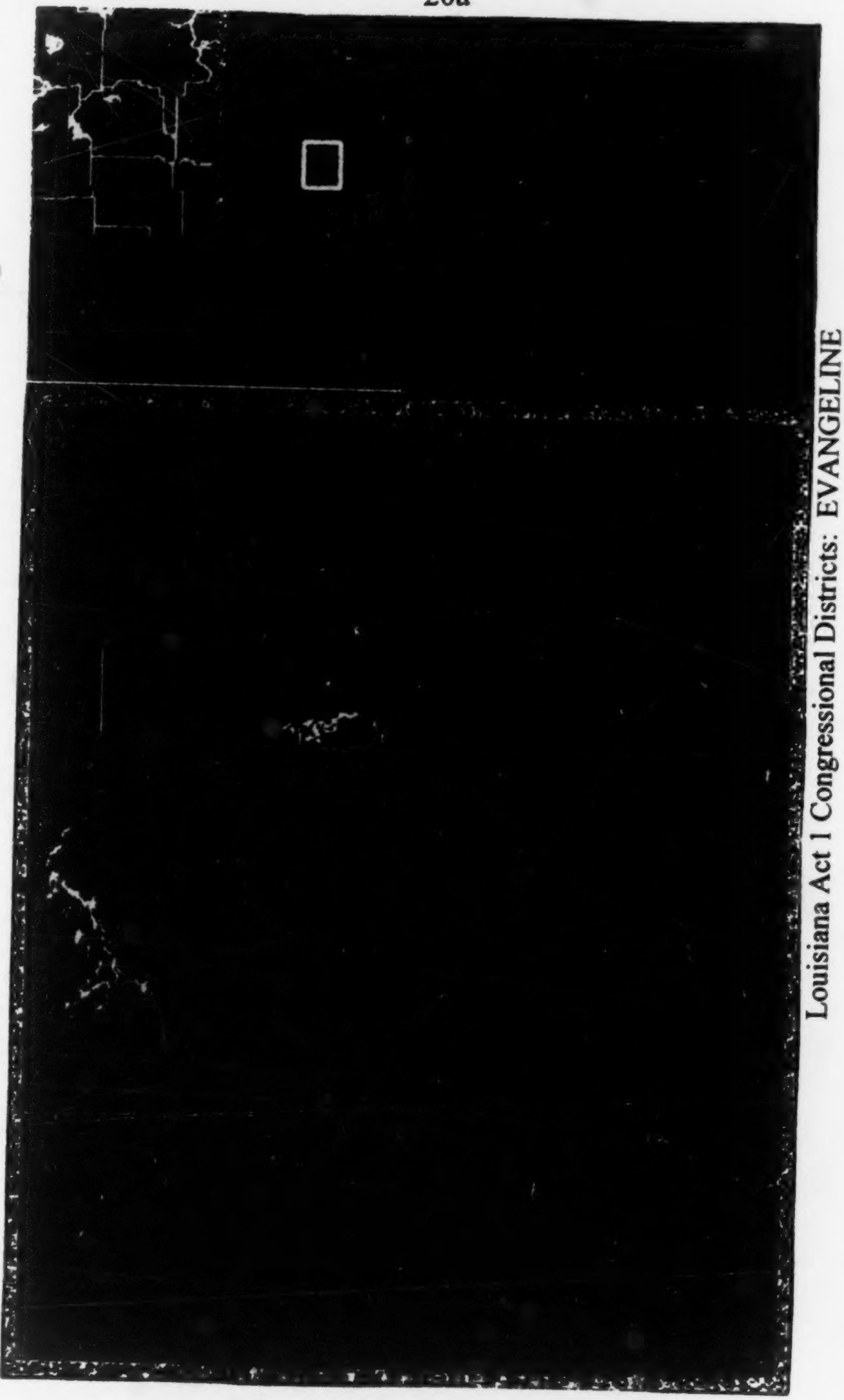

Louisiana Act 1 Congressional Districts: EVANGELINE

(3)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 94-558

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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11pp

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-558

UNITED STATES OF AMERICA, PETITIONER

v.

RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

As explained in our jurisdictional statement, this Court should note probable jurisdiction in this case because it raises most of the major issues left open by *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993). Nothing in appellees' Motion to Affirm undermines that conclusion.

1. The district court's core holding was that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." J.S. App. 5a. As we have argued in our jurisdictional statement (at 10-12), that holding conflicts with *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977) (*UJO*), finds no support in *Shaw*, and would apply strict scrutiny to a large number of redistricting plans at all levels of government.

Appellees offer no defense of the district court's holding that strict scrutiny applies to all race-conscious districting decisions. Instead, they contend that the district court's judgment can be affirmed without deciding that issue. According to appellees, the district court's finding that District 4 is bizarre provides an independent ground for applying strict scrutiny in this case. Mot. to Affirm 21-22.

The district court, however, did not treat the bizarre shape of a district as an independent ground for applying strict scrutiny. Instead, it viewed District 4's shape as nothing more than circumstantial evidence bearing on the question of whether the legislature had engaged in race-conscious redistricting. The court was thus able to reject persuasive objective evidence that District 4 was not bizarre (its resemblance to Old District 8) on the ground that the State "admitted that race played a large if not dominant role in the map as it is now drawn." J.S. App. 4a. The court's finding of bizarreness was therefore not independent of its core holding that all race-conscious redistricting is automatically suspect. This Court should note probable jurisdiction to review that important and incorrect decision.

2. In addition, the appropriate standard for deciding whether a district is bizarre within the meaning of *Shaw* is itself an important question that warrants this Court's review. What constitutes a bizarrely shaped district under *Shaw* is not a purely factual issue that the lower courts should be left to decide based on intuition or aesthetic reactions. This Court should establish meaningful legal standards for resolving that question.

In our jurisdictional statement, we identified several principles that should govern the inquiry whether a district is so bizarre on its face that it rationally can be understood only as an effort to segregate voters on the basis of race, thus calling for strict scrutiny. First, we argued that a bizarre district for this purpose is one that reflects an extraordinary departure from a State's usual redistricting practices. J.S. 13. Second, we argued that the requirement that a district be bizarre "on its face" mandates an objective inquiry, not a subjective inquiry into the legislature's intent based on after-the-fact statements made by legislators. *Id.* at 15. Finally, we argued that the relevant inquiry under *Shaw* is whether the district as a whole is bizarre, not whether isolated segments of it are. *Id.* at 14 n.1.

Appellees implicitly urge a different set of standards. They believe that strict scrutiny is called for if a district deviates from certain model redistricting standards, regardless of the extent to which the State has actually employed those standards in forming districts. Mot. to Affirm 16-19. They believe that objective indications that a district is not bizarre may be discounted if the legislature admits that it intended to create a majority-minority district. *Id.* at 19-21. And their position is that a district is suspect if only isolated segments of it are bizarre. *Id.* at 19. This Court should grant plenary review to decide what set of standards should govern the decision whether to employ strict scrutiny.

3. In our jurisdictional statement, we argued that application of the proper legal standards leads to the conclusion that District 4 is not so bizarre on its face that it can be understood only as an effort to segregate voters on the basis of race. J.S. 13-17. As discussed in our jurisdictional statement (at 13-14), the most important evidence that District 4 is not bizarre in that sense is that it resembles various versions of old District 8. Appellees' principal response is that District 4 does not correspond precisely to the contours of old District 8. Mot. to Affirm 20. The relevant inquiry,

however, is not whether District 4 is exactly like other districts that have been employed in the past. Rather, the relevant inquiry is whether District 4 reflects an extraordinary departure from the State's usual redistricting practices. District 4's resemblance to various versions of old District 8 is, we believe, convincing evidence that it does not reflect an extraordinary departure from the State's usual practices.

Appellees suggest that District 4 is bizarre because it divides 12 parishes. As pointed out in our jurisdictional statement, however, redistricting plans inevitably divide parishes. The redistricting plan used by the State in the 1980s, for example, divided seven parishes. J.S. App. 65a. The number of parishes split by District 4 does not constitute such an extraordinary departure from the State's usual redistricting practices as to trigger strict scrutiny.

Appellees also assert (Mot. to Affirm 17) that District 4 is bizarre because it is 250 miles long. But other districts in the current State plan are also long. District 6 is about 200 miles long, District 5 is about 190 miles long, and District 3 is about 175 miles long. In the court's plan (J.S. App. 38a), District 4 is about 200 miles long and District 3 is about 175 miles long. When a State is relatively large, but its population is not, the State's apportionment scheme will predictably contain some large districts. There is nothing bizarre or even unusual about that.

Appellees also assert that District 4 "is not united by a meaningful commonality of interest" (Mot. to Affirm 18). But as stated in our jurisdictional statement (at 6), the record in this case contains unrebutted evidence that the population along the Red River Valley included in District 4 shares common social and economic interests. Appellees contend that "the inquiry must be whether the

District generally—not merely a portion of it—is united by a common interest." Mot. to Affirm 18. Where a congressional district must contain over 600,000 people, however, the standard proposed by appellees is unrealistic. Not surprisingly, appellees offer no evidence that the State has ever followed it. This is not a case in which only a minute percentage of the people in a district share common interests. The population along the Red River Valley included in District 4 comprises a substantial part of that district. That proof rebuts appellees' assertion that District 4 completely jettisons the State's interest in putting together people with common interests.

Finally, appellees contend that District 4 is bizarre by focusing on small areas that have odd boundaries. Mot. to Affirm 19. As we have stated, however, the proper inquiry under *Shaw* is whether the district as a whole can be considered bizarre, not whether some segments of its boundaries are irregular. See *Vera* v. *Richards*, No. H-94-0277 (S.D. Tex. Aug. 17, 1994), slip op. 91-92. Beyond that, appellees' contention ignores the evidence that some of the lines that may appear bizarre actually follow precinct lines. See J.S. 14 n.1.

4. As noted in our jurisdictional statement (at 18-20), this case also raises the question of the proper standard for determining whether a State's redistricting scheme is supported by a compelling interest in complying with the Voting Rights Act. The district court reviewed the evidence *de novo* to determine whether a second majority-minority district was compelled by the Voting Rights Act. This Court's decisions, however, permit a State to undertake remedial efforts when it *reasonably believes* that a prima facie case of a statutory violation would otherwise exist, not only when a district court

determines *de novo* that the State's belief was correct. J.S. 18.

Appellees do not offer any defense of the district court's compelling interest approach. Instead, they argue that the judgment should be affirmed because the State failed to present evidence that would demonstrate its reasonable belief that a second majority-minority district was compelled by the Voting Rights Act. When a district court has applied the wrong legal standard, however, the proper course is ordinarily to remand to the district court for it to consider the evidence under the correct standard. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982). It is usually inappropriate for an appellate court to engage in *de novo* appellate fact-finding in these circumstances. *Ibid.*

In any event, as stated in our jurisdictional statement, the State had a sufficient basis in evidence for concluding that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, supported the creation of a second majority-minority district. Appellees do not dispute that two of the three preconditions set forth for establishment of such a district in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), are present in this case. In particular, appellees do not deny that blacks are politically cohesive and that whites usually vote sufficiently as a bloc to defeat the minority's preferred candidates. Instead, appellees insist that the black population is not sufficiently concentrated to constitute a majority in a compact district. Mot. to Affirm 26.

As we have argued in our jurisdictional statement, however, the *Gingles* compactness requirement is satisfied when a district can be drawn that is reasonably compact in light of the State's usual practices. J.S. 19. District 4 satisfies that standard. It is similar to previous districts drawn by the State in the same geographic area. It is also comparable in its length to other districts drawn by the State in this very plan. Appellees rely on the district court's finding that District 4 is not compact. Mot. to Affirm 26. Because that finding was made without regard to the State's actual practices, however, it is based on an improper legal standard and is erroneous.

The State also had a reasonable basis for concluding that it would be unable to satisfy its burden under Section 5, 42 U.S.C. 1973c, to show that a redistricting plan with only one majority-minority district was free of discriminatory purpose. The history of discrimination in the State, the evidence that voting remains racially polarized, and the fact that the State had previously drawn districts similar in shape and location to District 4 could have reasonably led the State to conclude that it would have difficulty showing that a failure to draw a second majority-minority district was based on legitimate redistricting considerations rather than an intent to dilute the black vote. Appellees ignore that evidence.

The State could also take into account the fact that the Attorney General had already objected to its redistricting plan for the Board of Elementary and Secondary Education (BESE), a plan that had included only one majority-minority district. The Attorney General's objection letter specifically explained that the State's BESE plan had fragmented minority concentrations among three majority white districts and that this fragmentation had not been justified in terms of neutral districting principles. See DX 16 (1993 Hearing). Appellees question the validity of the Attorney General's objection (Mot. to Affirm 24-25), but they offer no evidence that those findings were unsupportable. The State could therefore reasonably rely on them. See *Shaw* v. *Hunt*, No. 92-202-CIV-5-BR (E.D.N.C. Aug. 22, 1994), slip op. 69 & n.34 (State may rely on Attorney General's objection unless it is clearly unsupportable).

5. Finally, this case raises the question whether a State can have a compelling interest in drawing a majority-minority district when it may not be compelled to do so under the Voting Rights Act. We believe that the State has such an interest when there is evidence that racial bloc voting by whites precludes black voters from having a realistic opportunity to elect a candidate of their choice in a majority-white district. Appellees accuse us of arguing that "the State has a compelling interest in creating two safe black districts, because if it didn't, there wouldn't be two safe black districts." Mot. to Affirm 27. That mischaracterizes our argument.

Our position is the one set forth by Justices White, Rehnquist and Stevens in *UJO*. In that case, those three Justices stated that a State is not "powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls." 430 U.S. at 167. Where such polarization exists, a State may seek to achieve a "fair allocation of political power between white and nonwhite voters." *Ibid.* None of the other Justices in *UJO* addressed that issue. And this Court in *Shaw* noted that the issue was an open one. 113 S. Ct. at 2832. This case presents an appropriate vehicle to resolve that question.

For the reasons stated in our jurisdictional statement as well as those stated herein, the Court should note probable jurisdiction.

Respectfully submitted.

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NOVEMBER 1994

Supreme Court, U.S.
FILED
JAN 30 1995
OFFICE OF THE CLERK

⑤ ④

No. 94-558 and 94-627

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, APPELLANT

v.

RAY HAYS

STATE OF LOUISIANA, APPELLANT

v.

RAY HAYS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

JOINT APPENDIX

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JURISDICTIONAL STATEMENTS FILED SEPTEMBER 26, 1994
PROBABLE JURISDICTION NOTED DECEMBER 12, 1994

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U.S. DISTRICT COURT FOR WESTERN LOUISIANA (SHREVEPORT)

HAYS, ET AL.

v.

LOUISIANA, ET AL.

Filed: 08/10/92

CIVIL DOCKET FOR CASE #: 92-CV-1522

* * * * *

8/10/92	–	COMPLAINT filed in 3rd JDC Lincoln Parish on 8/7/92 #40,396. (bp) [Entry date 08/13/92]
8/10/92	1	NOTICE OF REMOVAL by State of Louisiana, Edwin W Edwards, Samuel B Nunez Jr, John A Alario Jr, W Fox McKeithen & Jerry M Fowler.

* * * * *

8/12/92	3	ORDER CONSTITUTING THREE-JUDGE COURT; Requesting Judge: Donald E. Walter; Circuit Judge: Jacques L. Wiener, Jr. & District Judge: John M. Shaw. (signed by Judge Henry A. Politz)

* * * * *

8/26/92	15	MINUTES OF COURT from trial w/out jury 1st day. (by Judge Donald E.

Walter, Judge Jacques L Wiener, Jr. & Chief Judge John M. Shaw)

* * * * *

8/27/92 16 MINUTES OF COURT from trial w/out jury 2nd day. At close of plaintiff's case, defense made oral motion to dismiss which was taken under advisement by panel. (by Judge Donald E. Walter, Judge Jacques L. Wiener, Jr. & Chief Judge John M. Shaw)

* * * * *

8/19/93 69 MINUTES OF COURT from Evidentiary Hearing. Pursuant to 18 USC Sec. 2284, a Three-Judge Court convened to allow additional and supplemental testimony and evidence in light of Shaw vs. Reno. The Court revokes its ruling issued following trial in this matter in August, 1992. At the conclusion of this hearing, counsel may submit simutaneous affidavits by 8/27/93. Counter simultaneous affidavits are to be submitted by 9/3/93. (by Judge Donald E. Walter)

* * * * *

12/28/93 75 MEMORANDUM RULING, by Judges Shaw, Walter & Wiener, declaring Act 42 of 1992 to be unconstitutional and the redistricting plan embodied therein to be null and void; enjoining the State of Louisiana from holding any future congressional elections based on the Plan; and, although we do not invalidate the

		1992 congressional elections held thereunder, hold that the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the plan shall expire, ipso facto, at noon on the 3rd day of January, 1995, such terms of office not to be extended or carried over into the next Congress in any manner whatsoever.
12/29/93	76	JUDGMENT in favor of Plaintiff and against Defendants. It is adjudged that Act 42 of 1992 of the State of Louisiana is unconstitutional, and the redistricting plan embodied therein is null and void; It is further adjudged that the State of Louisiana is enjoined from holding any future congressional elections based on the plan contained in Act 42 of 1992 of the State of Louisiana; It is further adjudged that, while the 1992 congressional elections are not invalidated, the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the plan in Act 42 of 1992 of the State of Louisiana, and each district created under such plan, shall expire, ipso facto, at noon on the 3rd day of January, 1995, and such terms of office and such districts shall not be extended or carried over into the next Congress in any manner whatsoever. (signed by Robert H. Shemwell)

* * * * *

7/1/94 87 LETTER from Supreme Court of the United States to Robert Shemwell regarding [80-1] appeal that the judgment is vacated and the case is remanded to the US District Court for further consideration. The judgment or mandate will not issue for at least 25 days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing. Copy forwarded to Judge Walter, Judge Shaw, Judge Wiener by ds.

* * * * *

7/5/94 89 MOTION to intervene by USA with Memorandum, Proposed Order and Proposed Answer referred to Judge Donald E. Walter

* * * * *

7/6/94 91 ORDER granting [89-1] motion to intervene by USA. (signed by Judge Donald E Walter)

7/6/94 92 AMENDED COMPLAINT by Ray Hays, Edward L Adams, Susan Shaw Singleton, Gary Stokley.

* * * * *

7/11/94 96 MOTION by defendants State of Louisiana et al for continuance of trial on merits, or, in the alternative, for severance of preliminary injunction hearing from trial on the merits and for other

		relief with Proposed Order referred to Judge Donald E. Walter
7/11/94	97	MEMORANDUM by USA in support of [96-1] motion for continuance of trial on merits
7/11/94	98	ORDER denying [96-1] motion for continuance of trial on merits, denying [96-2] motion for severance of preliminary injunction hearing from trial on the merits and for other relief (signed by Judge Donald E. Walter)
		* * * * *
7/21/94	105	MINUTES OF COURT from bench trial/evidentiary hearing. Pursuant to remand by the Supreme Court and in accordance with 28 USC 2284, a 3-Judge Court convened to determine the constitutionality of the appointment of congressional districts, Act 1 of the 1994 2nd Extraordinary Session of the Louisiana Legislature. (by Judge Donald E. Walter, Judge Jacques L. Wiener, Jr. and Judge John M. Shaw)
		* * * * *
7/22/94	112	MINUTES OF COURT from 2nd day of bench trial/evidentiary hearing. The Court heard argument on plaintiffs' motion for judgment as a matter of law made at the close of defendants' evidence. For the reasons orally assigned, the motion is GRANTED. The Court finds Act 1 of the Second Special Session of the 1994 Louisiana Legislature is un-

constitutional in that it violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The court will issue a written ruling in accordance with its findings. Defendant's motion under Rule 62 for stay pending appeal is DENIED, (by Judge Donald E. Walter, Judge Jacques L. Wiener, Jr. and Judge John M. Shaw)

* * * * *

7/25/94 118 ORDER granting Plaintiffs' Motion for Judgment as a Matter of Law, as set forth herein. This court reserves the right to issue, and intends to issue, a memorandum opinion consistent with this Order, (signed by Judge Donald E. Walter)

* * * * *

7/26/94 123 NOTICE OF APPEAL to Supreme Court by USA from order entered 7/26/94 by Judges Walter, Wiener, Shaw.

* * * * *

7/29/94 124 MEMORANDUM OPINION pursuant to Order Document #118 filed 7/25/94 (by Circuit Judge Wiener, Chief District Judge Shaw and District Judge Walter)

* * * * *

7/29/94 125 NOTICE OF APPEAL to Supreme Court by State of Louisiana, Edwin W Edwards, Samuel B Nunez Jr, John A Alario Jr, W Fox McKeithen, Jerry M

		Fowler from order entered 7/26/94 by Judges Walter, Wiener and Shaw.
8/2/94	126	CERTIFIED COPY OF JUDGMENT issued by the Supreme Court of the United States on 6/27/94 remanding this case to the United States District Court for the WDofLA for further consideration.
		* * * * *
8/15/94	130	COPY OF ORDER from United States Supreme Court. The applications for stay presented to Justice Scalia and by him referred to the Court are granted and it is ordered that the judgment of the United States District Court for the Western District of Louisiana, Civil Action No. CV 92-1522S, filed July 25, 1994, is stayed pending the timely filing of statements as to jurisdiction in this Court. Should such statements be so timely filed, this order shall remain in effect pending this Court's action on the appeals. If the judgment should be affirmed, or the appeals dismissed, this stay shall expire automatically. In the event jurisdiction is noted, or postponed, this order shall remain in effect pending the sending down of the judgment of this Court. Justice Scalia would deny the applications.
		* * * * *
12/9/94	135	ORDER of SUPREME COURT regarding [118-1] order, directing that said

		order shall be re-entered. Order [118-1] re-entered and re-noticed to counsel on 12/9/94.
12/9/94	118	RE-ENTERED ORDER granting Plaintiff's Motion for Judgment as a Matter of Law, as set forth herein. This court reserves the right to issue, and intends to issue, a memorandum opinion consistent with this Order, (signed by Judge Donald E. Walter)
12/9/94	136	NOTICE OF APPEAL to Supreme Court by USA from order entered 12/9/94, signed by Judge Donald E. Walter.

* * * * *

12/12/94	139	NOTICE OF APPEAL to Supreme Court by State of Louisiana, Edwin W Edwards, Samuel B Nunez Jr, John A Alario Jr, W Fox McKeithen, Jerry M Fowler, Unidentified State, from order entered 12/9/94.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO. CV 92-1522S

RAY HAYS, ET AL., PLAINTIFFS

versus

EDWIN W. EDWARDS, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF THE STATE OF LOUISIANA,
ET AL., DEFENDANTS

[Reentered Dec. 9, 1994]

ORDER

IT IS ORDERED that Plaintiffs' Motion for Judgment as a Matter of Law be and it is hereby GRANTED.

IT IS FURTHER ORDERED that Act 1 of the Second Special Session of the 1994 Louisiana Legislature (the Act) is unconstitutional, in that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and the redistricting plan embodied in the Act is null and void.

IT IS FURTHER ORDERED that the State of Louisiana is permanently enjoined from holding any elections under the Act.

IT IS FURTHER ORDERED that, although we do not invalidate the 1992 congressional elections, the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the plan in Act 42 of 1992 of the State of Louisiana, and each district created under such plan, shall expire, *ipso facto,* at noon on the 3rd day of January, 1995, and such terms of office and such districts shall not be extended or carried over into the next Congress in any manner whatsoever.

IT IS FURTHER ORDERED that a congressional redistricting plan for the State of Louisiana is hereby provided, as set forth in Appendix A, on the basis of which all congressional elections for the seven (7) United States Representatives from the State of Louisiana to the One Hundred Fourth Congress shall be conducted, with the dates for qualifying and for holding such elections to be established by the cognizant officials of the State of Louisiana according to law; and that all subsequent elections of United States Representatives from the State of Louisiana shall be conducted under the plan provided by this court until and unless a congressional districting plan enacted by the State of Louisiana according to law is submitted to this court and is determined by it to be constitutionally valid.

IT IS FURTHER ORDERED that, as prevailing parties in all phases of this case to date, the Plaintiffs are entitled to recover all reasonable costs, attorneys' fees and expenses, including reasonable expert witness fees, pursuant to 42 U.S.C. 1988, in amounts to be determined by reference to United States Magistrate Judge Roy S. Payne for review and recommendations; provided, however, that such determination shall not prevent this Order from becoming final immediately upon its being filed.

This court reserves the right to issue, and intends to issue, a memorandum opinion consistent with this Order.

FOR THE COURT:

/s/ Donald E. Walter

DONALD E. WALTER
District Judge

Judgement Entered 7/26/94

Judgement Reentered 12/9/94

LOUISIANA CONGRESSIONAL DISTRICTS

The State of Louisiana is divided into the following seven Congressional Districts:

DISTRICT 1

District 1 is composed of Precincts 3-G, 5-G, 8-G, 9-G, 10-G, 1-H, 2-H, 3-H, 4-H, 5-H, 6-H, 7-H, 8-H, 9-H, 1-K, 2-K, 3-K, 4-K, 5-K, 6-K, 7-K, 8-K, 9-K, 10-K, 11-K, 12-K, 13-KA, 15-K, 16-K, 17-K, 18-K, 19-K, 20-K, 25-K, 27-K, 28-K, 34-K, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132, 134, 135, 136, 137, 170, 171, 174B, 175, 176, 177, 178, 182, 183, 184, 185, 193, 194A, 195, 210, 211, 225, 226, 227, 228, 229, 230, 231, and 234 of Jefferson Parish; Precincts 3-20, 4-8, 4-9, 4-10, 4-10A, 4-11, 4-12, 4-13, 4-13A, 4-14, 4-14A, 4-15, 4-16, 4-16A, 4-17, 4-17A, 4-18, 4-18A, 4-19, 4-20, 4-20A, 4-21, 4-21A, 4-22, 4-23, 5-12, 5-13, 5-14, 5-15, 5-16, 5-17, 5-18, 5-19, 7-33A, 7-40, 7-41, 7-42, 12-4, 13-1, 14-1, 14-2, 14-3, 14-4, 14-8, 14-9, 14-10, 14-11, 16-2, 17-1, 17-17, 17-18, 17-18A, 17-18B, 17-19, 17-19A, 17-20, and 17-21 of Orleans Parish; St. Tammany Parish; Tangipahoa Parish; and Washington Parish.

DISTRICT 2

District 2 is composed of Precincts 1-G, 2-G, 4-G, 6-G, 7-G, 11-G, 13-KB, 14-K, 21-K, 22-K, 23-K, 24-K, 26-K, 29-K, 30-K, 31-K, 32-K, 33-K, 1-W, 2-W, 3-W, 4-W, 5-W, 6-W, 7-W, 8-W, 9-W, 104, 107, 115, 131, 133, 138, 150, 151, 152, 153, 154, 155, 156, 157A, 157B, 172, 173, 174A, 179A, 179B, 180, 181, 186, 187, 188, 189, 190, 191, 192, 194B, 196, 197, 198, 212, 213A, 213B, 213C, 214, 215, 232, 233, 235, 236, 237, 246A, and 246B of Jefferson Parish and Precincts 1-1, 1-2, 1-5, 1-6, 1-7, 2-1, 2-2, 2-3, 2-4, 2-5, 2-6, 2-6A, 2-7, 3-1, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-9, 3-10, 3-12, 3-13, 3-14, 3-15, 3-16, 3-17, 3-18, 3-19, 4-2, 4-3, 4-4, 4-5, 4-6, 4-7, 5-1, 5-2, 5-3, 5-4, 5-5, 5-6, 5-7, 5-8, 5-9, 5-10, 5-11, 6-1, 6-2, 6-4, 6-5, 6-6, 6-7, 6-8, 6-9, 7-1, 7-2, 7-4, 7-4A, 7-5, 7-6, 7-7, 7-8, 7-9, 7-9A, 7-10, 7-11, 7-12, 7-13, 7-14, 7-15, 7-16, 7-17, 7-18, 7-19, 7-20, 7-20A, 7-21, 7-22, 7-23, 7-24, 7-25, 7-25A, 7-26, 7-26A, 7-27, 7-27A, 7-27B, 7-28, 7-28A, 7-29, 7-30, 7-31, 7-32, 7-33, 7-34, 7-35, 7-36, 7-36A, 7-37, 7-37A, 7-38, 7-38A, 7-39, 8-1, 8-2, 8-4, 8-5, 8-6, 8-7, 8-8, 8-9, 8-10, 8-11, 8-12, 8-13, 8-14, 8-15, 8-16, 8-17, 8-18, 8-19, 8-20, 8-21, 8-22, 8-23, 8-24, 8-25, 8-25A, 8-26, 8-26A, 8-27, 8-27A, 8-28, 8-29, 8-30, 9-1, 9-2, 9-3, 9-3A, 9-3B, 9-4, 9-5, 9-5A, 9-6A, 9-6B, 9-6C, 9-6D, 9-6E, 9-6F, 9-7, 9-8, 9-8A, 9-8B, 9-9, 9-10, 9-11, 9-12, 9-13, 9-14, 9-15, 9-16, 9-17, 9-18, 9-19, 9-20, 9-21, 9-22, 9-23, 9-24, 9-25, 9-25A, 9-26, 9-26A, 9-27, 9-28, 9-28A, 9-28B, 9-28C, 9-28D, 9-28E, 9-28F, 9-29, 9-29A, 9-30, 9-30A, 9-31, 9-31A, 9-31B, 9-31C, 9-31D, 9-31E, 9-32, 9-33, 9-33A, 9-34, 9-34A, 9-35, 9-35A, 9-36, 9-36A, 9-36B, 9-36C, 9-37, 9-37A, 9-38, 9-38A, 9-38B, 9-39, 9-39A, 9-39B, 9-40, 9-40A, 9-40B, 9-40C, 9-41, 9-41A, 9-41B, 9-41C, 9-41D, 9-42, 9-42A, 9-42B, 9-42C, 9-42D, 9-42E, 9-43, 9-43A, 9-43B, 9-43C, 9-43D, 9-43E, 9-43F, 9-43G, 9-43H, 9-43I, 9-43J, 9-43K, 9-43L, 9-43M, 9-43N, 9-44, 9-44A, 9-44B, 9-44C, 9-44D, 9-44E, 9-44F, 9-44G, 9-44H, 9-44I, 9-44J, 9-44K, 9-44L, 9-44M, 9-44N, 9-44O, 9-44P, 9-44Q, 9-45, 9-45A, 10-3, 10-4, 10-5, 10-6, 10-7, 10-8, 10-9, 10-10, 10-11, 10-12, 10-13, 10-14, 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7, 11-8, 11-9, 11-10, 11-11, 11-12, 11-13, 11-14, 11-15, 11-16, 11-17, 11-18, 11-19, 12-1, 12-2, 12-3, 12-5, 12-6, 12-7, 12-8, 12-9, 12-10, 12-11, 12-12, 12-13, 12-14, 12-15, 12-16, 12-17, 12-18, 12-19, 12-20, 13-2, 13-3, 13-4, 13-5, 13-6, 13-7, 13-8, 13-9, 13-10, 13-11, 13-12, 13-13, 13-14, 13-14A, 13-15, 13-16, 14-5, 14-6, 14-7, 14-12, 14-13, 14-13A, 14-14, 14-15, 14-16, 14-17, 14-18, 14-18A, 14-19, 14-20, 14-21, 14-22, 14-23, 14-24, 14-24A, 14-25, 14-26, 14-26A, 15-1, 15-2, 15-3, 15-4, 15-5, 15-6, 15-7, 15-8, 15-9, 15-10, 15-11, 15-11A, 15-12, 15-12A, 15-13, 15-13A, 15-13B, 15-14, 15-14A, 15-14B, 15-14C, 15-14D, 15-14E, 15-14F, 15-14G, 15-15, 15-15A, 15-15B, 15-16, 15-17, 15-17A, 15-17B, 15-18, 15-18A, 15-18B, 15-18C, 15-18D, 15-18E, 15-18F, 15-19, 15-19A, 15-19B, 15-19C, 16-1, 16-1A, 16-3, 16-4, 16-5, 16-6, 16-7, 16-8, 16-9, 17-2, 17-3, 17-4, 17-5, 17-6, 17-7, 17-8, 17-9, 17-10, 17-11, 17-12, 17-13, 17-13A, 17-14, 17-15, and 17-16 of Orleans Parish.

DISTRICT 3

District 3 is composed of Precincts 13, 14, 15, 16A & 16B, 27A, 27B, 28, 29, 31, 32, 33, 34, 35A, 35B, 36, 37, 40, 41, and 42 of Ascension Parish; Assumption Parish; Iberia Parish; Precinct 1-GI, 1-LA, 1-LB, 2-L, 216, 217, 238, 247, 248, 249, and 250 of Jefferson Parish; Lafourche Parish; Plaquemines Parish; St. Bernard Parish; St. Charles Parish; St. James Parish; St. John the Baptist Parish; Precincts 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, 1-7, 2-1 & 2-3, 2-2, 2-4, 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-9, 4-1, 4-2, 4-3, 4-4, 4-5, 4-6, 5-1, 5-2, 5-3 & 5-4, 6-1, 6-2, 6-3, 6-4, 7-1, 7-2, 7-3, 7-4, 8-1, 8-2, 8-3, 8-4, 9-1, 9-4, and 9-5 of St. Martin Parish; St. Mary Parish; and Terrebonne Parish.

DISTRICT 4

District 4 is composed of Precincts 1-1, 1-3, 1-4, 1-6, 1-7, 2-6-0, 3-1, 4-1, 4-2, 4-3, 5-2, 5-2A*, 5-5, and 5-10 of Allen Parish; Beauregard Parish; Bienville Parish; Bossier Parish; Caddo Parish; Claiborne Parish; De Soto Parish; Natchitoches Parish; Red River Parish; Sabine Parish; Vernon Parish; and Webster Parish.

DISTRICT 5

District 5 is composed of Avoyelles Parish; Caldwell Parish; Catahoula Parish; Concordia Parish; East Carroll Parish; Precincts 1-2, 1-13-0, 1-13-1, 4-1-2R, 4-1-3R, 4-1C, 4-2-0, 4-2-1, 4-3, 4-4, 5-1, 5-2-0, 5-2-1, 5-2-2, 5-3, 5-4C, 5-4R, and 5-5 of Evangeline Parish; Franklin Parish; Grant Parish; Jackson Parish; La Salle Parish; Lincoln Parish; Madison Parish; Morehouse Parish; Ouachita Parish; Rapides Parish; Richland Parish; Tensas Parish; Union Parish; West Carroll Parish; and Winn Parish.

DISTRICT 6

District 6 is composed of Precincts 1, 2A & B, 3, 4A, 4B, 5A, 5B, 6, 7A, 8A & 8B, 9, 10A & 10B, 11A & 11B, 12, 21A & 21B, 22A, 22B, and 23 of Ascension Parish; East Baton Rouge Parish; East Feliciana Parish; Iberville Parish; Livingston Parish; Pointe Coupee Parish; St. Helena Parish; West Baton Rouge Parish; and West Feliciana Parish.

DISTRICT 7

District 7 is composed of Acadia Parish; Precincts 1-2, 1-5, 2-1, 2-2-C, 2-2-0, 2-3, 2-4-C, 2-4-0, 2-5, 2-6-C, 3-2, 5-1, 5-3, 5-3A*, 5-4-C, 5-4-0, 5-4-X*, 5-4-Y*, 5-6, 5-7, 5-8, 5-8A*, 5-9, 5-11, 5-12, and 5-13 of Allen Parish; Calcasieu Parish; Cameron Parish; Precincts 1-1, 1-3, 1-4-0R, 1-4-1R, 1-4C, 1-5-0, 1-5-1, 1-6, 1-7, 1-8-0, 1-8-1, 1-8-2, 1-9-0C, 1-9-1C, 1-9-2C, 1-9-3C, 1-9R, 1-10-0, 1-10-1, 1-11, 1-12, 1-14, 1-15, 1-16, 1-17-0R, 1-17-1R, 1-17C, 1-18-0C, 1-18-1C, 1-18R, 1-19, 2-1, 2-2, 2-3, 2-4, 2-5, 3-1-0, 3-1-1, 3-2-0, 3-2-1, 3-2-2, 3-3, 3-4, 3-5, 3-6-0, 3-6-1, 3-6-2, 3-7, 3-8, 4-1-0R, and 4-1-1R of Evangeline Parish; Jefferson Davis Parish; Lafayette Parish; St. Landry Parish; Precincts 9-2, and 9-3 of St. Matrin Parish; and Vermilion Parish.

The precincts enumerated herein are the precincts existing on April 17, 1994 established by the respective parish governing authority and used by the Louisiana Legislature in Act 1 of the Second Extraordinary Session of 1994.

Congressional District Statistics

Total Population

District Name	Number Members	Total Popula-tion	Ideal Popula-tion	District Vari-ance	% District Vari-ance
District 1	1	602,842	602,853	−11	0.00%
District 2	1	602,877	602,853	24	0.00%
District 3	1	602,839	602,853	−14	0.00%
District 4	1	602,876	602,853	23	0.00%
District 5	1	602,933	602,853	80	0.01%
District 6	1	602,774	602,853	−79	−0.01%
District 7	1	602,832	602,853	−21	0.00%

PLANWIDE STATISTICS:

Range of populations:	602,774 to 602,933
Ratio range:	1.0003
Absolute range:	−79 to 80
Absolute overall range:	159
Relative range:	−0.01 to 0.01%
Relative overall range:	0.03%
Absolute mean deviation:	36.00
Relative mean deviation:	0.01%

Congressional District Summary

Total Population and 1994 Registered Voters

District Name	Total Pop.	Total White	Total Black
District 1	602,842	515,665	72,979
	100.00%	85.54%	12.11%
District 2	602,877	215,630	365,874
	100.00%	35.77%	60.69%
District 3	602,839	443,616	142,167
	100.00%	73.59%	23.58%
District 4	602,876	397,629	195,980
	100.00%	65.96%	32.51%
District 5	602,933	410,725	187,223
	100.00%	68.12%	31.05%
District 6	602,774	402,995	191,421
	100.00%	66.86%	31.76%
District 7	602,832	452,878	143,637
	100.00%	75.13%	23.83%
Total	4,219,973	2,839,138	1,299,281
	100.00%	67.28%	30.79%

Congressional District Summary – Continued

Total Population and 1994 Registered Voters

District Name	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
District 1	332,945	296,205	32,354
	100.00%	88.97%	9.72%
District 2	292,713	110,239	176,552
	100.00%	37.66%	60.32%
District 3	330,048	250,432	76,915
	100.00%	75.88%	23.30%
District 4	299,652	214,031	82,876
	100.00%	71.43%	27.66%
District 5	333,182	239,419	92,379
	100.00%	71.86%	27.73%
District 6	332,407	238,560	91,507
	100.00%	71.77%	27.53%
District 7	336,429	258,583	76,329
	100.00%	76.86%	22.69%
Total	2,257,376	1,607,469	628,912
	100.00%	71.21%	27.86%

Parish Population by Congressional District

Total Population and 1994 Registered Voters

Census Unit	Total Pop.	Total White	Total Black
District 1			
Jefferson Parish	289,679	261,785	16,940
Orleans Parish	39,761	36,804	2,219
St. Tammany Parish	144,508	126,806	15,917
Tangipahoa Parish	85,709	60,601	24,527
Washington Parish	43,185	29,669	13,376
Total District 1	602,842	515,665	72,979
District 2			
Jefferson Parish	145,700	78,880	60,365
Orleans Parish	457,177	136,750	305,509
Total District 2	602,877	215,630	365,874
District 3			
Ascension Parish	21,079	10,831	10,107
Assumption Parish	22,753	15,273	7,349
Iberia Parish	68,297	46,940	20,154
Jefferson Parish	12,927	10,505	1,737
Lafourche Parish	85,860	72,371	10,703
Plaquemines Parish	25,575	18,522	5,944
St. Bernard Parish	66,631	62,199	3,111
St. Charles Parish	42,437	31,638	10,253
St. James Parish	20,879	10,484	10,357
St. John the Baptist Parish	39,996	25,039	14,419
St. Martin Parish	41,337	27,044	13,664
St. Mary Parish	58,086	37,688	18,337
Terrebonne Parish	96,982	75,082	16,032
Total District 3	602,839	443,616	142,167

Parish Population by Congressional District—Continued

Total Population and 1994 Registered Voters

Census Unit	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
District 1			
Jefferson Parish	153,838	145,986	5,351
Orleans Parish	26,264	24,516	1,318
St. Tammany Parish	82,209	73,706	7,225
Tangipahoa Parish	45,988	34,015	11,831
Washington Parish	24,646	17,982	6,629
Total District 1	332,945	296,205	32,354
District 2			
Jefferson Parish	63,586	36,331	25,897
Orleans Parish	229,127	73,908	150,655
Total District 2	292,713	110,239	176,552
District 3			
Ascension Parish	13,202	7,186	5,983
Assumption Parish	13,823	9,411	4,410
Iberia Parish	38,442	27,371	10,951
Jefferson Parish	6,940	6,011	737
Lafourche Parish	43,794	39,464	4,243
Plaquemines Parish	14,589	10,454	3,137
St. Bernard Parish	39,195	37,308	1,754
St. Charles Parish	25,533	19,315	6,184
St. James Parish	13,676	7,093	6,567
St. John the Baptist Parish	22,263	13,593	8,580
St. Martin Parish	24,405	16,495	7,850
St. Mary Parish	30,986	21,270	9,508
Terrebonne Parish	43,200	35,461	7,011
Total District 3	330,048	250,432	76,915

Parish Population by Congressional District – Continued

Total Population and 1994 Registered Voters

Census Unit	Total Pop.	Total White	Total Black
District 4			
Allen Parish	7,050	6,049	972
Beauregard Parish	30,083	25,242	4,489
Bienville Parish	15,979	8,986	6,949
Bossier Parish	86,088	67,030	17,381
Caddo Parish	248,253	146,580	99,511
Claiborne Parish	17,405	9,313	8,041
De Soto Parish	25,346	14,003	11,141
Natchitoches Parish	36,689	22,357	13,779
Red River Parish	9,387	5,752	3,589
Sabine Parish	22,646	17,939	3,984
Vernon Parish	61,961	45,828	12,867
Webster Parish	41,989	28,550	13,277
Total District 4	602,876	397,629	195,980
District 5			
Avoyelles Parish	39,159	28,324	10,585
Caldwell Parish	9,810	7,970	1,760
Catahoula Parish	11,065	8,136	2,874
Concordia Parish	20,828	13,164	7,596
East Carroll Parish	9,709	3,355	6,291
Evangeline Parish	6,405	5,776	613
Franklin Parish	22,387	15,278	7,040
Grant Parish	17,526	14,860	2,540
Jackson Parish	15,705	11,065	4,589
La Salle Parish	13,662	12,271	1,257
Lincoln Parish	41,745	24,620	16,590
Madison Parish	12,463	4,961	7,415
Morehouse Parish	31,938	18,584	13,263

Parish Population by Congressional District – Continued

Total Population and 1994 Registered Voters

Census Unit	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
District 4			
Allen Parish	4,794	4,114	663
Beauregard Parish	16,481	14,255	2,125
Bienville Parish	9,883	5,606	4,270
Bossier Parish	39,519	33,037	6,146
Caddo Parish	123,515	81,992	40,524
Claiborne Parish	9,228	5,348	3,871
De Soto Parish	14,403	8,429	5,489
Natchitoches Parish	20,534	13,096	7,146
Red River Parish	5,997	3,848	2,144
Sabine Parish	13,586	11,310	2,206
Vernon Parish	20,275	17,723	2,135
Webster Parish	21,437	15,273	6,157
Total District 4	299,652	214,031	82,876
District 5			
Avoyelles Parish	23,253	17,472	5,729
Caldwell Parish	6,397	5,357	1,031
Catahoula Parish	7,573	5,738	1,822
Concordia Parish	12,063	7,868	4,184
East Carroll Parish	5,774	2,303	3,436
Evangeline Parish	4,234	3,858	371
Franklin Parish	13,240	9,682	3,549
Grant Parish	10,566	9,015	1,523
Jackson Parish	9,297	6,663	2,620
La Salle Parish	10,185	8,748	1,324
Lincoln Parish	20,477	12,814	7,450
Madison Parish	7,834	3,597	4,207
Morehouse Parish	17,008	10,816	6,178

Parish Population by Congressional District – Continued

Total Population and 1994 Registered Voters

Census Unit	Total Pop.	Total White	Total Black
District 5 – Continued			
Ouachita Parish	142,191	96,870	44,096
Rapides Parish	131,556	92,989	36,805
Richland Parish	20,629	13,020	7,539
Tensas Parish	7,103	3,292	3,785
Union Parish	20,690	14,850	5,767
West Carroll Parish	12,093	9,997	2,020
Winn Parish	16,269	11,343	4,798
Total District 5	602,933	410,725	187,223
District 6			
Ascension Parish	37,135	33,649	3,161
East Baton Rouge Parish	380,105	240,614	132,328
East Feliciana Parish	19,211	10,022	9,083
Iberville Parish	31,049	16,519	14,385
Livingston Parish	70,526	66,269	3,920
Pointe Coupee Parish	22,540	13,196	9,275
St. Helena Parish	9,874	4,725	5,127
West Baton Rouge Parish	19,419	12,329	6,993
West Feliciana Parish	12,915	5,672	7,149
Total District 6	602,774	402,995	191,421
District 7			
Acadia Parish	55,882	45,532	10,179
Allen Parish	14,176	10,259	3,524
Calcasieu Parish	168,134	128,181	38,445
Cameron Parish	9,260	8,685	503

Parish Population by Congressional District—Continued

Total Population and 1994 Registered Voters

Census Unit	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
District 5—Continued			
Ouachita Parish	70,344	51,233	18,890
Rapides Parish	68,931	51,287	17,105
Richland Parish	11,586	7,835	3,726
Tensas Parish	4,50	2,217	2,283
Union Parish	12,816	9,449	3,347
West Carroll Parish	6,808	5,809	986
Winn Parish	10,293	7,658	2,618
Total District 5	333,182	239,419	92,379
District 6			
Ascension Parish	21,626	20,151	1,402
East Baton Rouge Parish	199,491	139,379	58,868
East Feliciana Parish	10,844	6,129	3,804
Iberville Parish	20,020	10,953	9,058
Livingston Parish	40,589	38,303	2,232
Pointe Coupee Parish	14,550	8,899	5,644
St. Helena Parish	7,834	3,831	3,996
West Baton Rouge Parish	11,645	7,473	4,154
West Feliciana Parish	5,808	3,442	2,349
Total District 6	332,407	238,560	91,507
District 7			
Acadia Parish	32,718	26,875	5,817
Allen Parish	8,177	6,126	1,896
Calcasieu Parish	84,484	66,510	17,423
Cameron Parish	6,125	5,776	342

Parish Population by Congressional District – Continued

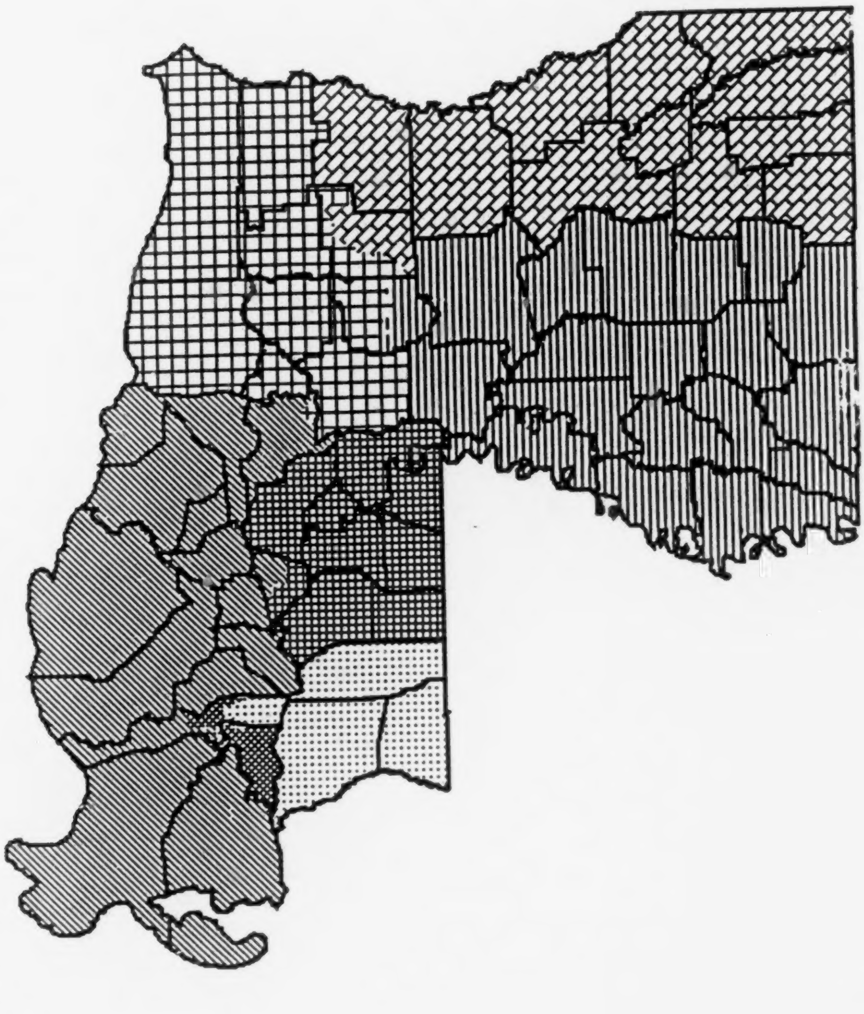
Total Population and 1994 Registered Voters

Census Unit	Total Pop.	Total White	Total Black
District 7 – Continued			
Evangeline Parish	26,869	18,629	8,088
Jefferson Davis Parish	30,722	24,721	5,836
Lafayette Parish	164,762	125,340	36,846
St. Landry Parish	80,331	47,532	32,392
St. Martin Parish	2,641	1,762	868
Vermilion Parish	50,055	42,237	6,956
Total District 7	602,832	452,878	143,637

Parish Population by Congressional District—Continued

Total Population and 1994 Registered Voters

Census Unit	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
District 7—Continued			
Evangeline Parish	17,546	12,336	5,193
Jefferson Davis Parish	17,704	14,562	3,116
Lafayette Parish	89,258	70,268	18,467
St. Landry Parish	48,634	28,873	19,638
St. Martin Parish	1,498	1,021	474
Vermilion Parish	30,285	26,236	3,963
Total District 7	336,429	258,583	76,329



UNITED STATES OF AMERICA
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

NO. CV 92-1522

RAY HAYS, ET AL

versus

STATE OF LOUISIANA, ET AL

Proceedings had before the Honorable Jacques L. Wiener, Jr. and the Honorable John M. Shaw and the Honorable Donald Walter, United States Judges, in Shreveport, Louisiana, beginning on the 26th day of August, 1992.

* * * * *

[233] Witness: Edward Adams

A. First of all, I want to make it clear that I am not opposed to black majority, or minority/majority districts. The district that I am in in the state legislature when it was redistricted was a black district, and a black candidate, Ms. Wilkerson, won that race. And I worked very diligently for her. I'm concerned as a citizen about the future of our state and black people in the state. The race that David Duke ran last year scared me really bad and it showed me some of the attitudes of the people in Louisiana. And when this district came up showing that in order to have a majority black district we would end up with five super white districts, it really freightened me. [234] It freightened me simply because of the fact that the last election was evident that, you know, we could not have that kind of polarization and that kind of effort in the state that would really hamper everybody in the state, and really bring us to a kind of confrontational attitude. And I feel like, you know, if we do not have enough black representation in the districts to at least make a difference, to at least make someone accountable, that we eventually as black people in this state would come to that confrontational attitude.

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RAY HAYS, ET AL, PLAINTIFFS

versus

STATE OF LOUISIANA, ET AL, DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

Proceeding held in the above matter on the 21st day of July, 1994. Morning Session.

* * * * *

[2] Witness: Glenn Koepp

Q. Mr. Koepp, please state your name and address for the record, please.

A. Glenn Koepp. 963 Keed Avenue, Baton Rouge, Louisiana.

Q. And by whom are you employed?

A. Louisiana Senate.

Q. In what capacity?

A. I'm the assistant secretary of the Senate. Along with that goes the Director of the Legislative Bureau as well as—I'm in charge of all redistricting activities and have been for the Senate since 1981. I've been with the special projects to draft legislation with the general administration of Senate activities.

Q. You testified in the prior hearing in this matter?

A. That's correct.

Q. Okay. You're involved in the past congressional reapportionments dealing with Act 42 and Act One; is that correct?

A. That is correct.

Q. Would you just briefly summarize what your goal in those processes were?

A. Well, like I said, in charge of the staff of the redistricting process. I am an attorney. One of the things that – of course it really starts in the mid years when we [3] worked with the Census Bureau in under Public Law 94-171 to start collecting the data and putting forth the lines or the boundaries that the Census Bureau will take census numbers on and basically precincts in Louisiana, visible precinct boundaries, work with the Census Bureau in doing that and establishing that.

I work with the development and implementation of the computer system that we have and I'm in charge of the staff. I have researchers and other people. We actually do, and I do, at the computer draft and draw redistricting plans. Once we get a plan at some legislator request I actually draft that into bill language and prepare it for introduction.

I staff the committee, work with the committee as well as with each of the individual senators in any request they have regarding redistricting.

* * * * *

[4] Q. In your capacity with the Senate were you the one who drew the plan that ultimately became Act One?

A. I am the one who drew that plan, yes.

Q. Could you explain to the Court your process, how you went about drawing it.

A. Well, really starting back at the beginning, when I testified before in this Court with regard to Act 42, I drew Act 42. At the time that we drew that Act we really, and as I said in this court before, really believed we had the [5] affirmative duty to create a minority district if we could without regard to the way it looked. We did that in Act 42. After that round of redistricting was over and of course the suit was filed in this Court as well as the North Carolina case, the Shelby Reno case decided and this court found Act 42 unconstitutional.

From that point, I guess in December when that came down, very soon after that, the first week of January, a number of the senators got very active in making requests and coming to me to see what we could do about creating a new congressional plan that would meet the Court requirements, this Court as well as—and in talking with the members of the Senate we always understood and believed that any plan that we passed, first of all had to go through the Justice Department Section 53 clearance and then it had to be submitted to this Court and this Court had an opportunity to look at it and say whether we had met their standards before we could actually qualify and qualifying, of course, starts next Wednesday. This was in early January.

One of the other major criteria that played a part in this is, of course, Louisiana passed a constitutional amendment last year that changed how we do regular sessions. And in the regular session this year we could not put up or introduce any bills dealing with redistricting, so we looked [6] at time frames very quickly in order for the legislature to have the opportunity to do its job in the redistricting process, approving plans, have it submitted to the Justice Department, have the time under Seciton 53 clearance to run, and then have this Court an opportunity to look at it before qualifying, we knew we had to do something fairly early. And I think that's why leadership on the Senate in particularly charged me with the responsibility to start drafting plans to work with anyone that came in and not only the senators themselves but anyone from the general public who requested it with the senators to start drawing options and plans. I started doing that. Probably drew 200 to 300 plans during that time.

There was some, I guess a lot of discussion during that period about what the Hays case meant. And a lot of confusion on some people's parts and not on others. There was a discussion of whether or not the case said you couldn't create two minority districts, whether it said you could create two minority districts, and I think the general opinion came out and my opinion was that this case and this Court didn't say you cannot have two minority districts in Louisiana nor did it say you had to have two minority districts, but it did set down some guidelines for redistricting. We started looking at that.

One of the things that was rather interesting in that [7] process at the time and a lot of senators really believed that this Court said don't take a district from Baton Rouge to Shreveport. And my first instructions really were from most of them don't go to Shreveport if you create a second minority district.

Out of the plans that we created I don't believe there was but a limited number of requests that didn't create the minority district in Orleans and maintained that minority district. There were numerous plans that were in different forms only created that same minority district, not a second one in the state. Attempts at human regionality as they find it, north-south line and trying or attempting not to cross that.

As this process unfolded we have a lot of outside people who participated, certainly the congressmen were working and meeting together trying to come up with a proposal that they thought they could get support on. The Louisiana Black Caucus certainly was doing that. There was an organization out of Atlanta that submitted data to us and plans. But the problems started occurring because there was no consensus anywhere. And as we continued to go with that leadership was getting pretty concerned that if we didn't have something done before the special session — before the regular session, that the legislature would be left out of the redistricting process which is basically their job to [8] do.

And with that in mind, with looking at the various groups that played in this I started working somewhat independently on my own but with directions from numerous senators in trying to come up with a plan that would meet this Court's requirements, that would do as little disruption as possible to the present districts and the incumbents in those districts, and that could possibly get consensus of the legislature and be passed.

Q. Let me interrupt you. What about the preclearance by the Justice Department in compliance of Section two?

A. Absolutely. We knew as soon as we adopted the plan and the Governor signed it we had to submit it to the Justice Department for preclearance and we were — I think if you will look at the testimony of the committee on both sides we really felt that not only did we have to get preclearance from the Justice Department in what we did but we had to also have that plan looked at by this Court and have their evaluation of that plan in light of the Shaw and their previous decision in this case. And I took all that into consideration.

When you start looking at the State of Louisiana there were several factors that I started looking at in attempting to come up with this particular plan, or at the time no particular plan. But when you look at the issues dealing [9] with religion and with rural versus the city where you have factories and manufacturing versus farming and that sort of stuff, you're drawing plans that are contained within a parish, even maybe house districts, it becomes a much easier task to do that than to divide the State of Louisiana up into seven congressional districts of approximately

603,000 people per district. Just about any way that you draw 603,000 people you cross just about – you include in that district people from every ethnic background, race background, and religious background, something that you really couldn't put together in blocks.

One of the traditional break downs or boundaries in Louisiana historically, we've always been talking about north and south. The north something being above Avoyelles, above the Acadiana area. It would take Concordia, Catahoula, across to Rapides and then Allen and Beauregard. If you consider that line north would be North Louisiana and below that line would be basically South Louisiana. The problem with that distinction is, of course, the Florida parishes which is more like North Louisiana but its below the line. And the legislature a number of years ago adopted an act and created parishes that are basically south of that line and west of the Mississippi bridge. The Mississippi area would be in Acadiana, the French Catholic influenced area of the state.

[10] When I started looking at all of this data one of the things that – if you look at what has happened in Louisiana since the '60's, population shifts have definitely occurred in the state and those population shifts seem to go to the south. There's less population each time in the north in the districts. If you look at the districting it moves south.

Of course, we all know that one of the big problems this time was when we had eight congressional districts it was easier to draw the state into eight than it was seven. Louisiana gained approximately 25,000 over the last ten years but it wasn't anywhere close to the national average so we lost a congressman. So as part of this we were going to seven congressmen. That increased each congressional district about 75,000 people more than the idea was in 1980 from about 525,000. When you took that 603,000, and draw the line across North Louisiana, and I was asked to do that by several people and create two North Louisiana districts, there's not enough population up there to completely create two districts. You have to move into Avoyelles or Evangeline or down into I guess Calcasieu or one of those along the line picking up 30 to 40,000 additional people. And that has to be done in order to meet that one man, one vote criteria where, of course, in congressional plans there is really no diversion between districts. You can't have a [11] large disparity between the number of people per district. So to start with we had to break that tradition.

The second thing is even if you break that tradition that creates a split parish. Then what you've got left in North Louisiana – I was never able to create a plan and didn't see any plans that came along created by anyone else that were all whole parishes in North Louisiana. Even if you add that in and create two districts up North you have to split some parish. And those splits are caused by the one man, one vote criteria. One of the big factors that started to play in this was I was asked to look at the old Eighth District, the old Eighth District being the highest minority population district in the state other than the minority district number two in Orleans and see what I could do to go off that creating a district and what the different districts would fall in line to after that. And I went back, not just to the 1981 congressional plan, but back to the beginning of 1970 or late '60's legislation –

Q. Let me interrupt you at this point and show you this State Exhibit 10.

* * * * *

[12] Q. When you're talking about how you went back and looked at the old plans what – are those the ones you're talking about?

A. Well, I was collecting as much information as could possibly be collected in the total process. One of the things—have to digress slightly.

One of the things that I was highly concerned with in Act 42 was the Sixth Congressional District and not the Fourth because as I said before, I really felt that we did have an affirmative duty at that time, which the Courts have certainly changed or have cleared that questioin up let's say. But the Sixth District in Act 42 caused me quite a bit of concern because it's in two pieces and it's a very, very thin, thin line that connects it, if you will.

And that concerned me from the terms of gerrymandering, just straight up gerrymandering. Not racial gerrymandering. Gerrymandering and particularly political gerrymandering. And that district was a result of—that was a republican district that we ended up putting two incumbent republicans at the time in. That was done by a predominantly democratic legislature. I really had concern for that.

[13] We started seeing plans that were sent down to us even by the now seven congressmen, and it's three republicans and four democrats out of that group. They still were trying to draw this sort of a—I really had concern about it. That really prompted me to go back and start looking very closely at past congressional districts and what they looked like.

One of the things that jumped out at me was—well, there were two things that really jumped out in early plans. One was how the old Eighth District went all the way from St. John Parish in the southeast all the way up to Natchitoches and Sabine in the North. The other thing that was significant about that plan was that I believe it was the Fifth District then that encompassed the northeast part of the state and then came down through Concordia Parish where Concordia and West Feliciana and turned and went across the Florida Parishes all the way to say Hammond. And I remember when that congressmen ran from those districts, I've lived in the Florida Parishes all my life.

But when I started looking at that and started designing whole precincts and whole parishes as I went up using that sort of old plan to do the Sixth District, instead of squeezing it out to a thin line, it became as we were doing that, as I was doing that, it became evident that there was a fairly significant number of minorities that were in that part of that old district that goes up the Red [14] River.

As I drew it – there was a lot of considerations we were trying to make at the time. One was prior to this when we did Act 42 we literally went through every little town, city, or village, and if it had more than two precincts we did segregate the district by race. We put the minority districts, the black precincts in the minority district and the whites in the other one to up that minority population.

And this plan – I did a lot of this in particular as we were developing it, worked very hard at least in the rural areas in the municipalities, the small towns, of not splitting them at all regardless, in keeping them together. We worked to keep parishes together and keep them as whole as possible.

One of the things historically that will jump out at you in that 1970 congressional plan, and I only went back to the '70 time because that's really when the one man, one vote criteria came in. We did very little changing prior to that all the way back to the early 1900's. One man, one vote really didn't apply. And, of course, we didn't have the voting rights act at that time so I did limit my inquiry to about the plan of 1968 that the legislation in '68 drew forward.

Even in that legislation the parish of Natchitoches and I believe Winn were split and between what was in the corner [15] then of the old Fourth and the Eighth and the

Fifth District came down and split St. Tammany Parish and took a little portion of the northern portion of St. Tammany Parish, which, of course, joined it with the major portion of that district being up in the Monroe area. So to split parishes has been something that we've done.

Certainly if you go forward with that historically Orleans Parish was split almost down the middle and Jefferson Parish. And I think that was a political decision made many years ago and had nothing to do with race but had to do with political influence or whatever and it split Orleans and Jefferson.

The first time you ever saw Orleans really come together was in 1981 when Orleans Parish itself was more than enough population to have a whole congressional district, you couldn't even have a whole Parish. And we took out at that time—the split remained a portion of Orleans that was not needed and stayed in the First District but the rest of Orleans was put in.

The result of 1990 with the Orleans area, Orleans Parish actually lost population. They went from some 550,000 I believe—559,000 to about 498,000. So they lost some 50,000 in the parish as a whole and then added to the fact that you went to seven congressmen you had to add and get that total number back up to 603,000, there was no way [16] to make Orleans a single district anymore and that drove part of the process that created the First District the first time and the Second District. The Second District is different in this plan than it was last time. Yes, it does split some areas in here.

Some of the reasons for the way that plan is drawn on the West Bank of Orleans, one of the big driving forces was the City of Westwego where the Speaker of the House lives. He insisted that all of Westwego be maintained whole in one of the two districts. It ended up in the Second District.

There was some other factors that played in that. Congressman Jefferson, one of the committees he's on has to do with airports and he felt very strong and none of the other congressmen really objected, to make sure that the airports, Orleans airport, which, of course, is way out in Kenner was in his district and we did that this time. That was in Act 42 and it still remains that way. And that's some of the reasons the way that district was drawn, but we had to get outside of Orleans to create that one.

Once I started working with it, I came up and putting together parishes in the old Eighth, it got to be a district that was very close to a minority district.

JUDGE WALTER: I'm sorry, say that again.

A. With whole parishes of the old Eighth, it became that the preliminary plans were very close at that time to [17] creating a majority-minority district in that Eighth District. And at that time I was still working under the directions of—at all cost out of Shreveport or out of Coushatta.

I eventually drew this plan, went into Caddo and created—the plan became a minority district. Some of the guidelines that I was really looking at in producing this particular plan included your instructions on narrow tailoring. And as I read the decision and your discussion about narrow tailoring, one of the things is if you create that second minority district that as you go along, once you reach the compelling state interest in the creation of that Second District is the compelling state interest, once you reach that at a 55 percent, you stop. Certainly in Act 42

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[18] JUDGE WALTER: What is the compelling state interest?

THE WITNESS: I believe the compelling state interest in this case and why we needed to do what we could to create that second minority district had to do with, one, we had to get preclearance from Section Five Justice Department.

JUDGE WALTER: What's compelling about that?

THE WITNESS: That's the only way that our plan was going to be implemented because under the Voting Rights Act unless we get a letter of no objection from the Justice Department, then we cannot implement that plan.

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[20] JUDGE WALTER: So your compelling state interest is to get preclearance from the Justice Department. Anything else?

THE WITNESS: Well, as discussed, and I think some of the senators will talk about it here and maybe house members. Louisiana has a district of racial discrimination, that's been established. That's why we're covered by Section Five of the Voting Rights Act. That's why we have to preclear all of our plans. Everything that happens in this state has to be precleared including some of our judicial districts. That played a big part in why we—

JUDGE WALTER: I'm sorry. I don't understand. What wrong are you seeking to remedy with this?

THE WITNESS: Well, one of the things is our past history of racial discrimination. That's what the Voting Rights Act, as I understand, the Voting Rights Act was about.

JUDGE WALTER: Didn't the Voting Rights Act remedy racial discrimination in voting?

[21] THE WITNESS: No, sir.

JUDGE WALTER: It didn't?

THE WITNESS: What it did is it forced the states to perfect the remedy. It set the guidelines and if we don't meet those guidelines to remedy it—I mean, its still the State's burden or the Court's burden to pass a plan that meets and does not meet Section Two of the Voting Rights

Act as well as Section Five. There's two provisions in there.

Section Two, of course, applying to everyone and Section Five specifically applying to those states that in the past, historically, had actively by legislation and by state action discriminate.

JUDGE WALTER: So the compelling state interest was you wanted to remedy past discriminations in voting?

THE WITNESS: That's one.

JUDGE WALTER: Okay. Anything else?

JUDGE SHAW: Is there any evidence that past discrimination created congressional districts in Louisiana?

THE WITNESS: Yes, sir. Of course, in 1980, the plan created in 1980 by the legislature was [22] thrown out because the legislature refused to create that minority-majority district that's the Major V Treen case and implemented on plan.

Now, actually the plan they implemented in the Treen case was a plan that I had drawn that the legislature of the Senate adopted but because of some technical problems with it that the House did, the Governor had the opportunity to veto it, so it fell through and we created one that was later found unconstitutional. Even though that plan was precleared by the Justice Department, which gets us back to our problem with Section Two.

Even if we passed a plan that got through Justice approval under Section Five, if that plan violated Section Two, the State is still subject to litigation and litigation costs and to have that plan thrown out under Section Two. So all of those considerations, all of that was part of the consideration.

Another compelling state interest –

JUDGE WALTER: Wait a minute. How does Act One remedy past discrimination?

THE WITNESS: How does it remedy past discrimination? It gives minorities an opportunity [23] to elect two members to Congress and elect candidates of their choice in at least two districts in the State of Louisiana that they have never had before. And it does that it, it doesn't guarantee the election and maybe Act 42 did guarantee the election of that second minority. Act One only gives them the opportunity to do it and that is what I believe this Court was talking about in very narrow tailoring the plan and that's how we went after that.

JUDGE SHAW: But Act One—you took this map that's under the direction of members of the State legislature, you were not free to draw a map as you so desired; is that correct?

THE WITNESS: Actually I drew this as I so desired. The first name on this particular plan and the way it's put together carried my name.

JUDGE SHAW: I understand. But you were free to draw this on your own?

THE WITNESS: Yes, sir.

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[24] JUDGE SHAW: Did any other district cross a major river like the Mississippi?

THE WITNESS: The Third District crosses the Mississippi, the First District, the Second District, they all cross it. The Sixth District crosses it.

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THE WITNESS: It's very close to the same length from one end to the other as the 1978 [25] district was because it went well beyond down to St. John Parish, so—

JUDGE SHAW: Two things about the old Eighth District, two things that are different. One of them, we didn't have Shaw Versus Reno at that time, and two, it's never been tested constitutional anyway, so I don't know if it ever was a constitutional created district or not.

THE WITNESS: Yes, sir, Your Honor, I agree with that. The thing is we were trying to look at what was tradition in Louisiana, what is the history of how we did things, and that's how it started coming about.

And if I may, one or the other – I don't know if it's compelling state interest, but one of the other things that certainly has being discussed and talked about is the continuity or the continuing creation of districts where the major base of a district remains whole so that the incumbents have an opportunity to get reelected, if you will, or at least have a district to run from. It was not the only consideration but it was because of the – that discussion is certainly political but it has to do with, of course, as long as the attorneys and congressmen will have [26] power you have there and the more influence you have and the states that have congressman that have long terms seem to have more influence. So that also plays some part in this and one of the things that President of the Senate and other members from Senator Greene to Senator Brinkhaus and any of the black groups too, Senator Bagneris, that time wanted to do anything we could to make sure that there was no direct going after any of the any incumbent republicans. So that if we could draw a plan and do it in such a way that the incumbent republicans as well as the incumbent democrats could at least come to some kind of agreement, although they might not absolutely like it but would sign off on it.

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[27] JUDGE WALTER: We're going to have to – I can understand the problem. We're going to have to split some parishes because of the population but it's just a string of them from Shreveport down to Ascension Parish, from Caddo to Ascension, I don't know. It doesn't seem like – it looks like the district –

THE WITNESS: Your Honor, if I may address that. Yes, there are a lot of parishes split and there are houses split, but every one of those splits do not relate to creating a minority district. Most of those splits relate to getting the one man, one vote criteria down.

JUDGE SHAW: I did have a question, let me interrupt and then you can go ahead and explain all you want. Is there any way to put DeSoto and Caddo back up in the Fifth, make some adjustment with the Sixth, and shorten the length of this district and find enough black votes in a more [28] compact district without violating the one, man one vote?

THE WITNESS: Your Honor, there were other plans.

JUDGE SHAW: Keeping the same direction and everything.

THE WITNESS: Well, no, there's nothing that I know of to keep that same direction. There were some plans, one of which was rejected by the Senate that was presented on the Senate floor that maintained a second minority district and it didn't go any further than Alexandria or Lafayette. But one of the issues that certainly we were looking –

JUDGE WALTER: 60 miles from Alexandria to Lafayette?

THE WITNESS: Well, it went on down the river.

JUDGE WALTER: But what I'm saying is as far as going North to Caddo.

THE WITNESS: It did continue on down to St. John and I believe St. James parishes. So I don't know the total distance. I'm sure it would be somewhat shorter than this one was but to what degree.

[29] One of the criteria we looked at was the look of the district, how bizarre does it look. Those districts, if you will, had fingers or runs on them and if you compared them to this, they were somewhat bizarre and the

legislature and the leadership really wanted to stay away with that in any plan they adopted.

And when you really talk about looks, one of the things that the legislature talked about in the committee testimony, if you're drawing a plan of Kansas, you can make nice square districts because Kansas is as square as it can be. Every section has a road on it, it's a section line and they're square, the whole state. It's visible boundaries so the Census Bureau takes the population counts on them and so it's easier to draw basically real square and what you may interpret as compact districts.

In Louisiana there are very few non-visible straight lines. We've got rivers and streams, bayous, lakes, even the outside boundary of our state is very in and out. So to make a district that – I mean, we made a decision to do redistricting on a precinct level. A lot of states go down to the block level, but we stopped [30] at the precinct level. We did that because it cut down on the amount of voter confusion, it makes it a lot easier to determine whose district you're in and where you are because of the precinct you're in. And we believe it cuts down on the amount of suits involving election contests. So we used precincts, but precincts by definition of public law 94171 with the Census Bureau which we fully participate in require us to put those on visible boundaries. The only exception to that is when the boundary is coterminous with a city, coterminous and it's non-visible, coterminous with a parish is non-visible or the state line. So that played a part in some of the looks of how these looks.

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[31] JUDGE WALTER: Let me ask it again. You started off with the idea that whatever happens, I'm going to wind off – wind up with one man, one vote and two majority, minority congressional districts?

THE WITNESS: No, sir.

[32] JUDGE WALTER: That is not where you started?

THE WITNESS: No, sir.

JUDGE WALTER: That's what I've been hearing you say.

THE WITNESS: The second majority-minority district, once I got looking at that old Eight, it became evident that we couldn't do that. It creates a second minority-majority district and another major part that played in that was what's the result in the rest of the state with the other congressional districts. All of that played very much into it because you can create minority—a second minority district probably in about six different ways but it does all kinds of other disruptions in other places so all of that—

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[33] THE WITNESS: No, sir. If I said that, that's not what I meant. What we were doing was attempting to meet all of the criteria if, in fact, when I finished trying to draw that and there was no way to put together a minority district other than a very bizarre way or if you in the creation of a minority district it may derive serious gerrymandering in other areas, then I don't think—I know the legislature would not have adopted it, that type of plan.

JUDGE WIENER: Everything you have just said in this statement presupposes an effort to get a second majority-minority district.

THE WITNESS: That was one of the things we were doing.

JUDGE WIENER: That's all I asked you and that's all Judge Walter asked you.

JUDGE WALTER: So you started off with those two concepts; one man, one vote, two majority-minority?

JUDGE WIENER: Because of preclearance and the legislative passage?

THE WITNESS: Or the ability to prove that we couldn't do it.

[34] JUDGE WIENER: All right. That shows you started with it.

THE WITNESS: Yes. It wasn't just that you had to do it, you either had to show that you can do it and meet this Court's requirements as well as and have a second minority district or you couldn't do that.

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[35] JUDGE WIENER: If you were in Alice in Wonder Land and not realistic, if you were given the authority to draw these seven districts and said "You don't have to consider partisan politics one way or the other, incumbent politics one way or the other," would you have been able to draw a plan that included seven congressional districts, two of which were majority-minority districts that came substantially closer to meeting the traditional districting criteria than this?

THE WITNESS: I believe this is as close as you could have come on in that almost. I mean you may can clean up a couple lines as far as whole parishes go.

JUDGE WIENER: My memory of your testimony last year I thought I remembered you saying that [36] if you could disregard that, that you could—of course, we were talking about the old '92 ethnic proportions but I thought that what you presented was more traditional than what this does in parishes, to distance, and narratives, compactness and so forth?

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[37] THE WITNESS: Yes, sir, that is correct. You could not do that. In fact, that significant minority population occurred in the Caddo area. There's another thing when we're talking about the population shift of the state and I

don't know if y'all were going to talk about this, but if you look at what occurred in this state over the last 20 years with regard to majority-minority population, minorities have concentrated, they've come off of the farms and little areas and concentrated in cities and municipalities and they were much more concentrated in the 1990 census than they were in the 1980 census.

I don't think we could have created this plan using 1980 data or population data because they weren't concentrated, they were more disbursed throughout the state. But in the last 10 years, it's been quite concentration. I think it's every [38] year in Shreveport where the population percentage year increases significantly. The city itself is very close to 50-50. The city of Orleans in 1980 was about 50-50 now it's almost 60 percent.

JUDGE SHAW: Shreveport is closer to 50-50?

THE WITNESS: Yes, sir, I believe that's correct.

JUDGE SHAW: Well, years ago it was 35-65.

THE WITNESS: Yes, sir. So it's the minority concentration are in municipal areas and in the towns and cities and out of totally dispersion within the population across the state and rural areas. So that played a part in creating that Second District, I think.

JUDGE WALTER: Let me ask this. So are you telling me that because of the demographics in the State of Louisiana there is no way to meet the dispersion of the jingles or gingles, whatever it is tests that simply put they aren't sufficient. The black population in this state is spread out so far that they don't constitute a group numerous and compact enough to meet the traditional standards of—

THE WITNESS: No, sir. What I said was in 1980—I don't think if you look at the 1980 [39] census I think what has happened is they are much more concentrated and together in compact areas so that you can meet the jingles criteria of a district and that's what this is an attempt to do.

JUDGE WALTER: And it carves out black portions of Shreveport, Lafayette, Alexandria, and Baton Rouge and you consider that compact?

THE WITNESS: It carves out – in Shreveport it does do that to make it continuous. In the Alexandria area there's a lot more than that than just the minority areas. East Baton Rouge is a minority area.

JUDGE WALTER: And Lafayette?

THE WITNESS: In Lafayette too. Although if you look there are some high, high black precincts that are very right on the edge of that district in East Baton Rouge Parish, for example. The city of Baker which is almost all white is in the Fourth District in the minority district, yet there are some predominately in heavy, heavy black precincts right along the border area that are in the Sixth Congressional District.

So it was the balancing, the narrow tailoring and the one man, one vote criteria. And the hardest part of this probably is the creation [40] once you get the base down is to come back and work a whole state in and get every district within 100 people or less and that's what we tried to do. So that one man, one vote equal population plays a big part after you get the base.

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[42] But the House Bill 2 is an example of what happens if you stay out of the Shreveport area and still attempt to create a minority district and you can do some tradeoffs. You can trade off the south end and go up the Mississippi River, of course, to Monroe or up to Monroe then across over to Grambling. Those sort of things but it still comes, I guess in my eyes, more much bizarre than this one and this one is routed in the fact that it follows to a great

extent what we have done in the past.

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Q. Mr. Koepp, in evaulating or in preparing to draft a reapportion plans is it safe to say that you have to consider race in preparing districts in order to assure that you're in compliance with Section Two of the Voting Rights Act?

A. I think you have to do that. One of the things you could say.

Q. Okay. You mentioned earlier about a type of plans that you saw and the ones that created the two north Louisiana districts. Did you look at those in light of what effect they had, for example, on incumbents?

A. The biggest disruption that the plans do with regard to creating two districts in the north part of the state [43] because we have lost a congressman from ten years ago from '87 and the shift in population further to the south added to, of course, the increased size of the districts, it has quite a significant impact. If you'll look at the different ones you've drawn, it does have a significant impact on the old – the way the incumbents, old districts worked and changes.

I guess the only districts that have somewhat the same look and feel to them are the two in North Louisiana because the other five in South Louisiana get really stirred up and it's a political, I think, question a lot of times and what areas is going to get stirred and what isn't.

Q. You talked about what you did in drawing up the plans. The particular plan that you drew that actually became Act One, once you came up with the concept, how did that proceed in a project process to become an act; what happened after you got the plan, how was it presented and etc.?

A. The mood, I guess, the legislature was in at the time no one could come up with any plan that they felt either would meet this Court's—that they could get a sufficient number of votes on to pass that would meet this Court's criteria and criteria on the Supreme Court case as well as get the Justice Department. You didn't have any real consensus within the legislature and there was a lot of worry, I think, on the part of leadership that they were [44] never going to get to the point where they could actually do what they feel like was their duty and responsibility and that is to adopt legal appropriate congressional districts.

When I came up with this concept and I know there was a lot of controversy and there was a lot of statements that this was done by a congressman but I did this and kept it under wrap. When I came up with this concept and it looked like this would work, this would work as far as the political ramification of the state and the congressman that you could have both democrats, republicans, minorities, majorities, that could sign off and work on this plan together and come up with a consensus that I believed met this Court's requirements, once that was done I called the President of the Senate. I told him I had come up with

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[45] and variations. Several senators, probably three or four of them, most of which came up and sat with me or my staff to do that, but Senator Chabert can draw it on his own, spending lots of night hours up there doing it. And he came up right about the time and I showed it to him and at the same time I was actually inputting some plans that were being sent from Washington by the congressmen at the request of Brinkhaus. All seven of them supposedly were meeting up there and I was in contact back and forth with them in putting their plan in.

As I stated earlier that plan still to me was objectionable because of the way it's treating Sixth District. You just really—it's quite a bizarre district, nothing to do with race or that. Senator Chabert actually faxed a copy and a map of this plan to Washington to I believe Congressman Tauzin and from that point by the next day the congressmen had dropped their plan and they all started talking about this one.

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[46] I talked to four of the congressmen, I believe. I talked to congressman Tauzin, Baker, Hayes, and Jefferson. I may have talked to Congressman Fields, but congressman Tauzin was kind of a spokesman for the group and he accepted the responsibility of getting in touch with Congressman McQuery in Livingston. My understanding was they all did talk with the Governor. There was reports in the paper and it's my understanding was that they all agreed. Although they didn't necessarily like everything about it, they agreed to support this particular proposal. I think Congressman Fields was the only one out of the group who would not publicly support it or go out for it, but the other seven did and said they would do their part as far as [47] trying to help get it passed through the legislature.

The leadership on both sides endorsed it. And as a

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Q. And the plan that ended up passing was essentially your plan except for differences in Lafayette and St. Landry; is that correct?

A. Main differences were in, yes, St. Landry area. Basically that had to do with Congresman Hayes putting more area, trying to carry those together as a whole with the city down there and also to put as many minorities that were historically in Congressman Hayes' district back in his district. So there were swaps that were made between

Lafayette, St. Landry and Evangeline and that's what that was all about. Those cuts were made mainly to try to put as much of Congressman Hayes' district back in that area, back in his district and into what we call tweaking (sic) or work to get those districts back to one man, one vote. So, yes, that's what occurred.

There were some—well, there were some significant changes in the House from what we passed out of the Senate and the Senate bill was amended and the amendments that occurred then—there were two things. Sabine Parish was moved into the Seventh and basically all of Evangeline was [48] put into the Fourth and the second set of amendments which really ended up causing all the controversy and forced the last one and compromised to go back the way this is had to do with Congressman Fields got—I don't know if it was him, but there were some amendments that were put on in the Senate, the result of which was to put the home where former Congressman Holoway lived in the Sixth District, to move him out of the Fourth and put him into the Sixth.

When I drew the plan I was aware of where Congressman Holoway lived and only because when we did it before under Act 42 Congressman—not Holoway, Congressman Baker. Congressman Baker ended up his house ended up in the Fourth Congressional District in that 42. I did not know that until we did it, but that's the only reason I'm very aware of where his home was because he called and Congressman Fields and Congressman Jefferson said make sure whatever you do, get his house in his district. I was not aware where Congressman Holoway lived, the city precinct or anything. Of course, I knew it was in Rapides down somewhere in the area down around Forrest Hill. The result of those amendments really made it just real thin because the Sixth District went way into this and it was just a little thin line that came around the west and south part of Rapides in the Sixth and again started getting those thin ribbons and making the district more bizarre. It was part [49] of the consideration of House to put it back like this. That was about the only changes.

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saw it. Nobody had saw this concept before. It started looking like somethig that made a lot of sense and took care of a lot more than just simply creating a second minority district. It did a lot of other things with regard to politics and making other districts in the state look right. So to say that they actually endorsed it, I wouldn't

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[50] Q. Let me ask you, finally, did you testify before the House and the Senate committees about this plan?

A. Yes, I did.

Q. And essentially what you've related to the Court is what you told members of the committee?

A. I believe what I've said here today is pretty much exactly the same thing.

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[57] Q. Now, in the creation of the districting alternative [58] available in the state of Louisiana, is it fair to say that if you recognize the Acadiana region and you create in that region from Avoyelles down a district based on whole parishes that you can create a district in that region that's going to have 40 to 45 percent minority population and not do serious damage to parish lines; is that fair to say?

A. I don't believe you could do that without crossing into east Baton Rouge Parish and picking up that minority population.

Q. Including—

A. To get it up to that 45 percent.

Q. Population?

A. Minority population, you've got to pick that major black population concentration in East Baton Rouge Parish.

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[60] Q. So as far as having to construct districts that would honor the regionality of the state, does that appear to maintain the regionality of North Louisiana?

A. To the absolute destruction of south Louisiana.

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[67] Q. Was the one that you spoke about earlier do you believe was the Ewing-Bankston Plan that you're talking about?

A. Yes.

Q. Would it include more region of the state in the Ewing-Bankston plan that used to be in what we refer to as the old, not the most recently passed Eighth District, the 1980s Eighth District?

A. Well, I guess because it went to portions of Rapides and it went up and down the river into East Baton Rouge and so, yes.

Q. It's would be closer to a refinement of the old Eighth in the 80s than your plan, than the District Four; isn't that correct?

A. It would be, but it would also be bizarre looking. So that's what part of the problem with that plan why it didn't pass the legislature. If Congressman Fields had his choice he would have taken that plan because he would have wanted anything he could get more concentrated down in that area. Several people did, but they were very concerned about the fact that even though it was there, still the way it was done they were areas that just had where you literally went in with the intent and purpose all over the edges to take in [68] white—take in minority precincts and put out majority precincts.

Q. Is it fair to say it had the same type of construction drawing in dividing precincts between races that you had characterized as the methodology used to do Act 42 originally?

A. Pretty much.

Q. But if it had a redeeming factor it was that that activity was done far more within an identifiable region with the State of Louisiana?

A. Okay, yes.

Q. If you don't construct in that manner, what would be—you've drawn an awful lot of plans in the state of Louisiana obviously. Is it fair to say you've drawn more plans than anyone else in the State of Louisiana?

A. I would think so.

Q. So you've got an awful lot of knowledge about different places, how to cut the apple a different way?

A. Yes.

Q. Is it fair to say that in recognizing and maintaining whole parishes and whole cities that your choices in the range of plans that you've seen is that you can get a plan in the Acadiana region that honors city and parish lines and the minority population will be 43, 45 percent or you can begin dividing parishes, dividing cities and move that [69] number on up to the 55 level represented by the Ewing-Bankston proposal?

A. Roy, I really believe if you keep it at the—I'm sorry, Paul. I think that it stays more in the 40, 30 to 40 percent minority until you start really splitting your parishes and then the more you split, the more you juggle it and you get it up to the 55.

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[72] JUDGE SHAW: Let me ask you something. To create this district, which has 602,000 people, you go to Shreveport and you cut out 82,000 black citizens or 33,000 black registered voters, then you go down to Baton Rouge 250 miles away and take out 180—cut out 108,000 blacks or 38,000 registered voters or technically 100,000, let's just round it off, black votes in the district of Third to 300,000 black votes, is there any problem with cutting those out of two cities at two different ends of the district to create this district by taking all those votes out at 250 miles apart and then filling in in the middle; is that any problem with compactness or whatever? You didn't have any problem with that?

THE WITNESS: I didn't.

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[73] Q. If you're not going to construct the district so that you place the minority citizens of Caddo Parish in this district, is there any reason in constructing the district as a minority-majority district, is there any reason once you're not going to Caddo to go ahead and go to Sabine or DeSota Parish?

Do they add to the benefit of constructing the majority-minority district or do they just add population? If you would—if you're not going to Caddo Parish—

A. Okay.

Q. Is there then any reason to extend this district beyond Rapides Parish?

A. There is Red River, Bienville, certainly Claiborne has significant minority populations in them and going up that direction you trap some population and DeSota has a significant minority population. Sabine does not.

If you were—in the first time that I did this, the [74] first attempt didn't go to Caddo, it stopped. It did take in all of Red River, all of Bienville, I believe, a southern portion Claiborne and maybe the Grambling area out of Lincoln.

Q. Now, you've said Claiborne a couple times, Claiborne is way up here, we don't mean Claiborne?

A. Yes, we do. You go all of Bienville, all of Red River, then all of Bienville, the southern portion of Claiborne and the Grambling area of Lincoln, but it didn't quite get to that 55 percent.

JUDGE WIENER: What is the magic of that?

A. In looking at the Court's—in this Court's discussion about narrow tailoring and the plan, if you going to create a minority district where minorities have an opportunity to elect a candidate of their choice, 55 seems to be the number that the legislature certainly believes in the literature and they believe the Court's been saying that 55 percent needs to get to that point in order to be a minority district.

JUDGE SHAW: We said that too?

A. It seems like you did in that case or somewhere I had—when you discuss narrow tailoring and the way I understood it, Your Honor, was that once we got to that threshold, that met our overriding state interest if in fact we have overriding state interest as you said and beyond [75] that was excessive, so we picked that 55 and tried to stop there.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

NO. CV-92-15222S

RAY HAYS, ET AL, PLAINTIFFS

versus

STATE OF LOUISIANA, ET AL, DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

The above-entitled proceedings were had before Judges Walter, Weiner, and Shaw in the United States District Court for the Western District of Louisiana, Shreveport Division, on the 21st day of July, 1994. Afternoon Session.

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[3] Witness: Glenn Koepp

A. I really do not. Any time you've got 55 percent registered voters in any district in Louisiana, the opportunity to elect a candidate of choice, you really lose that ratio, district racial block voting in the past. We got one Senate district, it is right on 55. It is actually 55.

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A. Senator Bankston's Senate district now and it has a 55 percent minority population in it and he was the white candidate in that race against a black [4] candidate and he won it.

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[5] Q. Okay. I think Judge Shaw talked to you about the concentration of the minorities in Shreveport and the concentration of the minorities in Baton Rouge, about 100,000 or whatever; and I don't know if this district connects those two populations. What about the area between those populations, are those—does that have a significant concentration of minority rather than the rest of the area?

A. That whole area up the Red River from Baton Rouge across over to Lafayette and St. Landry Parish has a high concentration of minorities as well as up the Red River; and it is not just—those two areas, if they were right next to each other and were joined themselves still wouldn't be a sufficient population to create a minority district or any [6] congressional district. You would have to add an additional population to it and that population is added between Baton Rouge going up to Caddo Parish does that and it is a significant minority population there.

Q. One final question. That Senate Bill 6, we talked about it not splitting up south Louisiana. As far as the political viability of that district and plan, what can you tell us?

A. Well, first of all, this plan reduced minority districts that's been in existence for at least ten years in Orleans Parish to some degree or the numbers I just read out at 50 percent and without question, I believe that is—would be a retrogression; and I don't think the legislature would even consider that, any side, because they were asking about a lawsuit to get it thrown out. It politically does things that you wouldn't have got a majority in the Senate. I don't think you could have got a majority in the House to vote for it, but certainly not in the Senate.

Q. What about insofar as incumbents? Does that put incumbents against each other?

A. One of the things that does that and down in the southern part of the state it seems that we [7] have two incumbents in the Jefferson, Lafourche, and Terrebone area which would be Livingston and Congressman Tauzin. In the Fourth District in the middle, you would have two. You would have both Baker and Congressman Fields. The Orleans one, you would have a single down there. The congressman of Jefferson would no longer be a minority district. The Sixth District would not have an incumbent. The Northeast District would not have an incumbent. Northwest District including the Caddo area, of course, have incumbents—Congressman McCreary and, of course, the southwest Lafayette would have an incumbent there. So, it does pit—in two different places, it pits two incumbents against each other.

Q. And is this a plan that would have—had it been the plan going forward to create a consensus, do you think we would have had a special session?

A. I don't think you would have ever got enough consensus out of the leadership and the government to ever call a session if this was the only thing that was on the table. And as I talked about earlier, that was the biggest concern was leadership, was tryng to find something that was acceptable enough that the legislature thought they had a reasonable opportunity to pass and at the same [8] time it would meet the requirements of the Voting Rights Act as well as the requirements that this Court had set down to the guidelines we had to follow; and actually this plan didn't do that. This type plan and a lot of them like this for lots of reasons, particularly in political area, disruptions it does to those traditional areas. I don't think the plan stood a chance.

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the 55 percent number came from. Do you consider a

55 percent district to be a superpacked district?

A. Certainly not. 55 percent were common

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[13] Witness: Richard Engstrom

Q. Dr. Engstrom, you testified in the previous proceedings; is that right?

A. Yes, both in 1992 and 1993.

MR. JEROME: Your Honor, because Dr. Engstrom has tesified before, I would dispense with the expertise of the witness.

MR. HURD: No objection, Your Honor.

Q. (By Mr. Jerome) Dr. Engstrom, did you prepare a report of this case?

A. Yes, I did. I prepared a report that is in the form of a declaration.

Q. Did you also prepare a variety of charts for the State in this case?

[14] A. Yes, I did.

MR. JEROME: May I approach the witness?

JUDGE WALTER: You may.

Q. (By Mr. Jerome) Dr. Engstrom, can you just look at Exhibit 13 of the State's exhibits and tell me whether that is your declaration?

A. Yes, it is.

Q. And what was the subjects or areas of inquiries you examined in this report?

A. The report examines two contentions made by the plaintiff, plaintiffs in this case. The first being that District Four in Act One, a district that is 55 percent in voter registration, 54.41, I believe, in voting age population African American, is a packed district, a district in which African American voters will dominate elections. In other words, a district in which there are too many African American voters. And a second contention they make which is that districts in Louisiana that range from about 35 percent to 45 percent, what they call black citizens, will provide a realistic chance for African Americans to elect African American candidates.

Q. And on the first question whether District Four is packed or has too many black voters in it, [15] how did you go about analyzing that question?

A. I examined both congressional elections, all of those in which there have been choices between African Americans and white candidates this century to my knowledge since the adoption of the Voting Rights Act and also state legislative elections.

Q. Are elections in which there are both black and white candidates relevant elections to examine for this inquiry?

A. Well, I think yes. If you are asking about the extent to which voting is vertically polarized, how much cohesion crossover, how much it takes in order to have a viable opportunity, then I think we need to look at elections involving biracial choices of candidates. Indeed, I think it is well established that biracial elections are the most probative for these purposes.

Q. Why did you choose congressional and state legislative races as far as types of races?

A. Congressional, of course, is litigation involves election system for electing members of the United States Congress. So, congressional elections are the elections to the office at issue. In addition, state legislative elections, I believe, are the most relevant, what we call exogenous [16] elections, meaning elections to another office; but they are the elections to which we elect representatives to the legislative body at the next level of government. So, I supplemented it with a look at state legislative elections, the last in 1991 with the new districting plan following the 1990 census.

Q. And starting with the congresstional races that you looked at, what were the results of your analysis and summary?

A. Well, I think we can say, first of all, I believe undisputed that no African American candidate has been elected to congress this century from Louisiana in a district that had a majority white voter registration. All of the African Americans that have been elected have been elected from districts that have African American voter majority registration. Even that in and of itself has not proven to be sufficient. Simply having an African American majority does not necessarily result in the election dominance and election of candidates of choice.

Q. When was a candidate of choice of African American voters first elected in this century in Louisiana?

[17] A. First time an African American was elected to United States Congress from this state was only four years ago in 1990 when William Jefferson was elected from what was at that time Congressional District Two based in the New Orleans area.

Q. What was the voter registration at the time of the election in that district?

A. At this time, Congressional District Two which was the majority African American district created following the Major versus Treen decision was as of the primary election in 1990, 59.9 percent African American, basically 60 percent.

Q. And then in 1992 when Mr. Jefferson ran for reelection in District Two, what happened then?

A. The voter registration in the new Congressional District Two which followed Act 42 on the basis of the 1992 election was a little above 60 percent, 60.2 in voter registration as of that primary.

Q. And in 1992, a second black candidate was elected to congress as well?

A. Yes, in 1992 the second black person was elected from Louisiana to the U.S. House and that was Cleo Fields who was elected from District Four established under Act 42 and and the basis of other [18] 1992 elections.

Q. What was the registration, black registration rate at the time of the election?

A. As of the primary election in 1992 in Congressional District Four, it was 63.3 percent African American.

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[19] JUDGE WALTER: I assume that he will say in his conclusion that 55 percent is not way too little. 55 percent is certainly not packed. There is no way that 55 percent is really on the cuff and that 35 percent is nearly enough.

THE WITNESS: I would say 35 to 45 percent. I don't believe given the electoral history of this state would provide a realistic chance for an African American to be elected.

JUDGE SHAW: We will not seriously entertain any cross-examination to the contrary of those two points. We are convinced already. You can

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[27] Witness: Dr. Sam Hillard

Q. How are you employed?

A. At the moment, I am retired.

A. Retired from what?

A. I was professor of geography at Louisiana State University for 23 years, and I retired last December.

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[28] Q. I see. And during your tenure at L.S.U., did you ever serve as chair of the Georgraphy Department?

A. The tenure chair is three years. I served two terms as chair.

Q. When you were at L.S.U., what courses did you teach?

A. I taught World Regional Geography, and then I taught seminars. I taught a course in the Geography of the South; and then I later towards the end of my career, I taught the Geography of Louisiana.

Q. How long did you teach the Geography of Louisiana?

A. About eight years.

Q. Have you published in the field of geography specifically relating to the geography of Louisiana?

A. I published on the South and Louisiana, I published a book on Louisiana and several articles on Louisiana.

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[29] MR. MULROY: I tender the witness as an expert in the area of geography of Louisiana.

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[30] Q. (By Mr. Mulroy) Dr. Hillard, how can you divide Louisiana into regions?

A. Well, you can do it any number of ways. The more traditional way is to resort to the physical environment.

Q. The more traditional way to do it would be to do it in physical geography, right?

A. Plant forms would be the most obvious and then going onto other things. But you could also divide it into regions based on culture, based on language. There are a number of maps that are done that way, but also religion and also industry, economics, any kind of thing like that.

Q. Also include agricultural factors?

A. Of course, yes.

Q. What is your evaluation of the ease or difficulty defining these kinds of regions within Louisiana?

A. They are easy to look at; but as one person said, they are easy to establish but difficult to define. Regions are very difficult because we have trouble coming up with universal agreements; and the reason that is the regions almost have to be defined [31] to use criteria and when you do that, sometimes you use more than one criteria. So, they rarely coincide. You end up with regions that are fuzzy around the edges.

Q. With respect specifically to cultural regions in the last several decades, the period of time after World War II, have those cultural regions within Louisiana become more distinct, less distinct? Have they stayed relatively the same?

A. My opinion is they have become less distinct through time.

Q. Can you give me an example of that?

A. Well, for example, the most important or the most widely recognized cultural regions in Louisiana is what we call the North/South contrast, the Anglo North versus the French South; and that perhaps if you could go back to the late nineteenth century was a very strong line. Many of the French people spoke French. So, it was very, very obvious; but with modern transportation and migration, people are simply more mobile than ever before. You find Cajuns in Shreveport, and you'll find Anglos all over Bayou Teche. So, we have sort of mixed ourselves a little bit more. And for that reason, I would argue it is more diminished.

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[33] Q. Let me ask you about a few other different ways just very quickly about defining regions in Louisiana. They can be defined agriculturally either by focusing on production of single crop, all crops, [34] or either combination; is that correct?

A. That's correct.

Q. If you take an individual crop, for example, cotton or soybean, is production of that crop distributed throughout the state?

A. Almost no crops are distributed throughout the state. Cotton is very specific. Sugar cane is very, very specific, and so forth.

Q. Are there crops which are produced in different areas of the state?

A. Generally sugar cane is highly concentrated in the coastal area in Terrebone Parish and Lafourche and places like that.

Q. What about soybean?

A. Soybeans of the four major crops that I talk about in my classes, soybeans has the widest distribution. It is grown all the way from the Arkansas border down into rice country. It is the most widely distributed.

Q. Very quickly, just the same question for rice: Is that a crop that's grown in different parts of the State of Louisiana?

A. We normally think of rice as being concentrated in the prairies of the southwest but actually there is a strong rice region in Arkansas [35] and it extends into northeastern Louisiana and the area just northeast of Monroe.

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Q. Would it be possible to draw a single congressional district within Louisiana that covered all of the soybean production areas in the single district?

A. It would be possible to draw the district, but I don't know how many people would be contained.

[36] Q. Right. Consistent with one person, one voter?

A. I would suspect not.

Q. Getting into a slightly different topic, we have different maps, regions, and productions by the major crops of Louisiana. Do they overlap perfectly, or do they—

A. Nowhere near.

Q. So, would it be possible to draw a congressional district that had—strike that. If you were to draw districts based on various crops, they would not overlap with each other, correct?

A. Possibly two, certainly not three, and no way could you contain them all.

Q. What about industrial activity in specifically, let's take as an example Petro Chemicals. Where are Petro Chemicals an important part of the economy in the State of Louisiana?

A. Petro Chemicals are concentrated in the corridor. We talk about the corridor between Baton Rouge and New Orleans along the river, and that's where it is highest concentration. But it also occurs in the coastal areas. It occurs in the southwest around Lake Charles, and there is also a considerable amount of activity in northwest [37] Louisiana.

Q. Also possible to draw a region through Louisiana based on natural factors such as soil, drainage, vegetation, or elevation?

A. Yes.

Q. Do these regions of Louisiana coincide perfectly with agriculture mapped regions or industrially mapped regions?

A. No, not at all. Well, possibly slightly; but not very closely.

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Q. Tell us something about the Red River valley?

A. The Red River Valley, the Red River, it forms the boundary between Oklahoma and Texas. Then it enters Louisiana and flows southeastward and eventually for a long time, the area was blocked by a [38] raft; but eventually, it gets into the area of flowing into the Atchafalaya

River and eventually into the Gulf of Mexico. It is an area that flows out of a kind of rock formation that is red, hence the name Red River Valley.

Q. Does this natural region, has it historically had an effect on Louisiana with respect to settlement patterns, agriculture, industry, things of that nature?

A. Oh, yes. The Red River, actually the first city located in Louisiana was not New Orleans. It was in the Red River. Natchitoches is the oldest; and, so, it became occupied very, very early in Louisiana history. It had a problem developing during the early years because the river was blocked by a huge log raft; but as soon as that was cleared out in the early nineteenth century, it became possible to ship goods down the Red River. So, it became a major artery of transportation rivaling that of the Mississippi itself.

Q. Same question for the present day realities of the region?

A. Well, I think that the Red River has maintained its importance. It was at one time a major artery of transportation, and, therefore, a [39] focus of economic activity; but as river traffic tended to incline, highways moved along the same areas, it is no accident that Louisiana, number one, travels along the Red River Valley indicating that it was an important artery of transportation.

Q. The various regions we have been discussing including specifically the Red River Valley but speaking generally about the agricultural, economic, and cultural regions that we have been discussing, do they generally follow parish boundaries?

A. No.

Q. To what extent would you say they do follow parish boundaries?

A. Let's just say it is random. They do not follow it.

Q. If you wanted to redistrict according to these regions of Louisiana, would it be difficult to following parish boundaries?

A. Yes.

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[41] Q. During what period of time was this map prepared?

A. Well, the second edition of his book was 1971. The earlier edition came out in the 1950's, and I think one of the problems is all of that came out before the Voting Rights Act, so this really reflects voting habits of white people.

Q. Could you give us a specific example of a region that's categorized in the way that fails to reflect the presence of blacks in the electorate?

A. Well, the one he lists as North Louisiana Planters, particularly the one on the parishes—I assume you are looking at the parishes that border the Mississippi River?

Q. Yes.

A. Those are North Louisiana Planter Parishes, in 1860 certainly or even 1900, certainly dominated by planters; but, of course, the population was a majority black. In fact, Tensas and Concordia in the 1860 census had over 90 percent black. It is not that high now. One would suspect that you can hardly characterize that as a North Louisiana planter today.

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[43] Q. All right. Let's focus specifically on Act One, please, Dr. Hillard. Have you had an opportunity, I believe you just said you had to compare Act One with prior congressional redistricting plans and alternatives?

A. Well, let's see. Act One is the seventh of the transparencies, yes.

Q. For purposes of our discussion of Act One, it might also make sense for you to refer to State Defense Exhibit 3 there. Based on your analysis, do you have an opinion about how Act One compares to the other plans you have just talked about in terms [44] of its correspondence to the various regions of Louisiana that we have been discussing?

A. Well, Act One is not a perfect fit with any one of them. It is not a perfect fit with any one of them. But on the other hand, neither are the others. I can find fault with all of them. But I would say that it satisfies my concept of regions better than most of them and certainly as good as any of them.

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[45] Q. (By Mr. Mulroy) If we define traditional redistricting principles to include correspondence with the various regions of Louisiana we have been discussing and also include respect for parishes, and then we were to keep in mind that we have to satisfy the one person one vote department, based on that analysis, do you think that Act One does more violence to traditional redistricting principles than is reasonably necessary?

A. No.

JUDGE WALTER: Reasonably necessary to conform to just those three things?

MR. MULROY: Yes, Your Honor.

JUDGE WALTER: Just name the three again.

MR. MULROY: The various regions of Louisiana –

JUDGE WALTER: Okay.

MR. MULROY: –as defined in the various ways discussed in Government Exhibit A that we have been discussing. One person one vote, and as [46] a subset of regions of Louisiana. I also asked Dr. Hillard to consider parishes as another way.

JUDGE WALTER: Parish lines?

MR. MULROY: Parish lines.

JUDGE WALTER: And it is your testimony that Act One does the least amount of violence?

THE WITNESS: I didn't say that. It does no more violence.

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[47] Q. (By Mr. Mulroy) Let's talk a little bit more about the Red River Valley. In your opinion, is the Red River Region an important region within the State of Louisiana?

A. Yes.

Q. Could you explain why you think the Red River Region is important to the State of Louisiana?

A. Well, I have already stated previously that it was important as an artery and it has certain distinctive characteristics as far as agriculture and it has physical characteristics. In other words, it is an area that's long been recognized as important and distinct from the hills to the north and the [48] Acadiana to the south. So, I think in that sense, it is important; and that's one of the reasons why I thought the plan reflected the kind of fit that seemed to me to be appropriate.

Q. If you followed the Red River Valley, do you have to cross a lot of parish lines?

A. If you follow it closely, you have to cross it, yes. In fact, the river itself cuts through every parish except Bossier and Caddo. It separates those two.

Q. With that understanding and excluding any consideration of parish lines and just focusing on the various types of regions that we have been talking about within the State of Louisiana, do you believe that Act One does any more violence to those types of geographic regions than other plans that you have considered?

A. I would say no. Again, I repeat, though, I don't think it is a perfect fit; but it is as good as the others that I looked at from my perspective, yes.

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[49] THE WITNESS: It does not correspond exactly; but when I said Red River, I don't know whether I said it or not, but I implied the Red River Valley and the Red River Valley has had an influence that's actually wider than itself. For example, many parishes like DeSoto and Sabine.

JUDGE WALTER: But you're not straddling – you're not thinking of the boundary? You're thinking of the south side of the valley. What's wrong with the north side?

THE WITNESS: Well, it is part of the valley; but at least it recognizes this northeast/southwest region I have always regarded as being very important.

Q. (By Mr. Mulroy) But is there a correspondence between old District Eight and the area we are discussing?

A. Certainly. Certainly.

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[53] Q. (By Mr. Mulroy) Is there a correspondence between old District Eight, particularly the old District Eight from the 1971 plan and District Four in Act One?

A. Give me just a moment. The 1971 plan?

Q. Yes. That would be under Tab four of Exhibit 8, one of the transparencies.

A. Yes, there is a correspondence. They are not the same, but District Eight under the 1971-73 plan that I have goes all the way from the Texas border to Lake Pontchartrain; and it configures in the central part of this area on the Red River. But it actually moves over a little bit closer to the Mississippi River. There is a resemblance. Let's put is that way, strong resemblance.

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[55] Let's talk about prior congressional plans if we could. In general, have prior congressional plans within the State of Louisiana in the twentieth century, have they followed closely the types of regional boundaries that we have been discussing?

A. They followed them to some extent; but to say they followed it closely, I don't think is quite accurate (and in some cases, it's a deviated market.

Q. Has that deviation increased within recent decades?

A. I think probably so.

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[56] Q. (By Mr. Mulroy) What factors in your opinion would have been driving this decreasing correspondence with natural regions in Louisiana within the last few decades?

A. Well, I think that rural urban migration was a very, very important factor. Secondly, I think that interstate migration of people from one place to another, the ease with which we move from one place to another and also the declining population in some areas. Things simply don't happen the way they once did. Their agriculture, for example, are extinct. We no longer have tongue oil in Louisiana. We only have two or three producers of tobacco. So, the things that we could call regions 50 years ago, they simply don't exist anymore.

Q. What about the one person one vote requirement? Does that have an effect?

A. Well, I would imagine it has. I can't imagine any other way. If you go from eight representatives down to seven, you automatically increase the amount of area covered by each representative and that would seem to be – once you make a district larger, you would have to increase [57] the heterogeneity in it. It would become less homogeneous.

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JUDGE WEINER: So, now you have the Metropolitan New Orleans Creoles; you have the Acadiana, French Catholic Acadians; you have the North Louisiana Scotch Irish Protestants; and the Red River Valley?

THE WITNESS: Well, may I say, those are ethnic or folk distinctions. I think those are diminishing, but when I was talking about the Red River corridor, I was thinking more in terms of economic or agricultural region rather than ethnic or folk region.

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[58] THE WITNESS: That would be straining the point; but, for example, the high water area in which certain coastal activity takes place, yes, that would have a certain—that's an economic region. A region is an area defined for a purpose. If you offer a definition, you create regions; and a region created by one person from a certain point of view would make no sense at all for another person creating a region with a different point of view. That's what makes it so difficult in my mind.

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[59] Q. Let's look at Overlay seven which overlays the same plan on a different type of region.

A. This is a map of the value of agriculture showing the richest areas in the state and the intermediate, and the poorest. It is the same overlay put over them. And, for example, District Five, one could say has the richest and the poorest agriculture in the entire state all within the same region.

Q. So, overall looking at the entire plan, what kind of correspondence do you see with agricultural regions?

A. I don't see any correspondence at all.

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[60] First of all, let's begin with District One. What correspondence, if any, do you see with regions within Louisiana and District One of Act One?

A. When I first looked at this, I was attracted to that area because in teaching the course over the years, I have been doing population graphs and things of that nature to show to the class; and St. Tammany Parish comes out as the fastest growing parish for the past three decades and maybe four decades. It is a tributary to New Orleans; and I think setting that aside as a different region, you might say represents the reality of the 1990's rather than some past period. I think that's an improvement over the previous one. Before, the Florida Parishes have always been considered a unit, a single unit. I would argue that the last 20 years with East Baton Rouge over in the west side and the St. Tammany Parish over in the east side, it is being split and drawn in two directions; but at the same time, fantastic economic growth, a lot of things are happening there.

Q. What's been driving this economic growth?

A. I think the proximity to New Orleans. There are lots of jobs, lots of money. There is limited space in New Orleans. It is just a nice place to go, [61] a nice place to live. It is growing. The school systems, for example, they have a hard time housing. It is really quite a phenomenal growth area. So, I was struck with that as being a good choice.

Q. What about District Three?

A. District Three, where?

Q. In the southern part of the state.

A. The southern part of the state. That's an area that has considerable unity to it in a variety of ways. First of all, coastal. Secondly, it has activities that are common throughout such as shrimping, fishing, and oystering. It is an area of intense oil production, and all of those are what I would regard as commonalities. Therefore, it does have a unit.

Q. We have discussed District Four. What about District Five at the northern part of the state?

A. District Five is the hill country. It is the hill country. It is an area that has a remarkable unity to it in terms of its physical geography that is really quite similar—its economic activities. It is an area of forestry, and it is not traditional plantation agriculture except in the far east. And insofar as ethnicity, we talk [62] about ethnicity, it is generally the area populated by southerners and mainly Scotch Irish. So, in that sense, it has a unity.

Q. Focusing on the general region of north Louisiana, in your opinion, is an east to west orientation for districts better or a north to south orientation; or is there as difference?

A. I like this one better because I think—

JUDGE WALTER: Which is that?

THE WITNESS: I like the east/west better; and my reasons for saying that are as I said earlier, if you do a north/south, you tend to—most of the ones that I saw tend to lump the huge plantation area over near the Mississippi with the hill country. Then they take the western part of the area which is hill country and lump it with others. So, it is not an important point; but in my opinion, my preference would be for this; and this has an added attraction in that it doesn't go straight east and west. It dips down to include parishes that have more in common with the hill country than they do with the Red River Valley.

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[64] Q. We will just—I am sorry. Putting SB-6 aside for the time being and looking in Act One District Six

which includes the western half of the Florida Parishes, what correspondence, if any, do you see with regions of Louisiana with District Six?

A. That--the district is—ethnically it makes a good deal of sense because it is an area populated by Anglos. Perhaps the plantation area is a considerable variety; but when you look at it in terms of, and consider that Mississippi is there, if we could carry the data that we have for Louisiana into Mississippi, the area just say, up around Natchez is almost identical to Louisiana across the river. So, in that sense, I don't see much problem with it. I think it makes a good deal of sense. Besides, you have got the Florida Parishes down here. You have already taken the eastern part off. So, I thought it didn't do violence to my concept region.

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[65] Q. Well, moving onto finally District Seven in Act One, what correspondence do you see, if any, with regions in Louisiana and District Seven?

A. District Seven, yes. That's the one that [66] almost all plans have in it. It is the southwestern prairies; and, I guess, if there is anything that Louisianaians agree on is that there is a region over there. This one is fairly close to what you see in others, and I think pretty well reflects the perceptions in Louisiana. Of course, you know, it splits the Acadiana in two. Most of them do that. You have an eastern area. That is Three. I think this fits very well because it is not only a French area; and in that sense has the unity, but it is also a pretty fine rice production. It is flat. It is the area of early oil production. There is a tremendous amount of manufacturing over there fabricating off-shore platforms. So, that makes all kinds of sense to me. At first glance, I thought maybe putting Vernon and Beauregard Parishes in there might be a little much; but you have got to realize when you talk about functions, they are hinterlands of Lake Charles. So, it is very likely that people in Beauregard Parish when they go to shop, they go to Lake Charles. So, that makes it sort of a unified region.

Q. One of the questions about District Four in addition to the other types of commonalities within the Red River system that we, region that we were [67] discussing, is there also a band of black population concentration along that route?

A. Today and historically because remember that was intense cotton production during the nineteenth century; and it still, yes, that population still resides there.

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[71] Q. In terms of natural features of the State of Louisiana, how important is the Red River Region?

A. It is second to the Mississippi. I think historically, you have to say that those are the two [72] most important waterways, arteries, and have been the focus of a lot of activity.

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[74] JUDGE WALTER: The northeast will always be large, right?

[75] THE WITNESS: Well, in Act One, it is not.

JUDGE WALTER: The district that encompasses Northeast Louisiana is divided there?

THE WITNESS: That's right.

JUDGE WALTER: And you don't think that from the Mississippi to the Texas line is large?

THE WITNESS: It is large, yes; but it has less variation in it than, say, District Five of HB-5, much less area.

Q. (By Mr. Mulroy) Could you explain quickly about District Six in Act One, what commonalities there are in terms of Louisiana regions in District Six and even F-1?

A. Commonalities?

Q. Yes.

A. Well, it is an Anglo area almost exclusively. It is an area that was settled very, very early. And as I say by Anglos. It is, it's an area that good portions of it forestry is an important activity. That's about it.

Q. From the perspective of combining similar Louisiana regions, does it make sense for District Six in Act One to combine the western part of the Florida Parishes with the rest of that district?

[76] A. West Feliciana is normally considered a historical plantation parish and as such could easily be involved with Concordia and Tensas. In that sense, yes, part of the Mississippi system.

Q. Is it the case that District Five and District Six in Act One split the northeast part of the state?

A. I don't follow you. You mean split it in the sense that—in what sense?

Q. When I refer to the northeast part of the state, I simply mean looking at the state without respect to any kind of Louisiana regions. If you just look in the northeast corner, there is a diagonal line that divided that northeast sector of the state between District Five and District Six.

A. Yeah.

Q. Does that type of division make sense in respect of respecting Louisiana regions?

A. Well, I thought it was a little bit—was better than if you use a north/south because you are taking the hill country and pretty much lumping it together. The only—it includes a little bit of the plantation area like east Carroll Parishes; but the others, of course, tend to be linked in the area further south. So, it splits it in a way that's not [77] too wide. I think perhaps fairly close.

JUDGE WALTER: Would you look at the Justice Department's Exhibit 2?

THE WITNESS: I don't have one by that label. Is it a plan like HB?

JUDGE WALTER: Hand this to him.

THE WITNESS: This would be black population.

JUDGE WALTER: And District Six is Anglo? That's what I wrote down you said.

THE WITNESS: Well, District Six on this?

JUDGE WALTER: Yes.

THE WITNESS: It was settled by Anglo people as part of the Anglo heritage in Louisiana but –

JUDGE WALTER: Yeah. Thanks.

THE WITNESS: But I don't understand.

JUDGE WALTER: Well, you said District Six was primarily Anglo.

THE WITNESS: I am sorry.

JUDGE WALTER: It didn't look like that to me.

THE WITNESS: May I clarify that?

JUDGE WALTER: Yes, sir.

[78] THE WITNESS: I meant Anglo as opposed to French. Talk about Anglo Louisiana and when we talk about Anglo Louisiana, we include Anglo white and also English speaking black. When we talk about French speaking Louisiana, we also include French speaking black.

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[84] Q. (By Mr. Mulroy) Just in general, have you looked over all the alternative plans?

A. Yes.

Q. Did you find any alternative plan that in [85] your opinion was significanly better in terms of corresponding with the Louisiana regions that we have discussed?

A. No.

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[89] Q. Is it fair to say they are not highly, all the plans that you have looked at are not highly distinguishable as one shining beyond the others? Is that a fair—

A. Well, I think some of them most of which—well, some of them are, clearly violate; but you can pick any one—

[90] JUDGE WALTER: Clearly violate?

THE WITNESS: Clearly violate what we have talked about in this room as being regional constructs, following traditional regions; but some of them seem to be better than others. And I think that Act One would fall under that category. That is, it is one of several that are considerably better than the others.

Q. (By Mr. Hurd) Is one of the characteristics of Act One that you particularly like the way that it does treat this northern section of the state?

A. Well, I think I have said that the thing that attracted me, the two things that attractd me most to Act One is the way the Florida parishes were treated and also the recognition of what I call the Red River corridor and those seem to me to reflect, oh, say the twentieth century and modern, what I would call functional regions, economic regions.

Q. So, this criticism in the northeast section is not a major concern whether it is split or not split?

A. I would say it is less of a concern, less of a concern to me.

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[92] Q. Okay. So, you are still—is it fair to say that what really attracts you then is to the value of having Red River Valley treated as a distinct district and the way it treated I want to say St. Tammany and the Floridas?

A. Yes.

Q. That's perhaps the shining part?

A. Those were the two that jumped out at me as being perhaps, if you are going to change things, that may be a nice way to do it, recognizing the future.

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[97] Q. (By Mr. Hurd) Do you have any opinion as to whether or not there is a correlation between the racial composition in that area and the constructioin that you observed in developing District Four?

A. Well, could I say that in my study of the historical population in the south, that area shows up as a fairly high population of minorities. Historically it is diminished a little in the past, but I wouldn't be surprised if there were not large numbers of minority scattered all along the Red River. I would be surprised if it were otherwise.

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[102] Witness: Senator Dennis Bagneris

Q. Senator Bagneris, please give us your name and address for the record, please.

A. Senator Dennis Raymond Bagneris, Sr. I reside at 4415 Franklin Street, New Orleans, Louisiana.

Q. How long have you lived in Louisiana?

[103] A. All my life.

Q. Okay. You are a State Senator from—

A. State Senator for District Three in New Orleans.

Q. Okay. And how long have you been in the Senate?

A. This is my eleventh session that I have completed. I was elected in October, 1983; and I have served since 1984.

Q. And have you served as chairman of any committees in the Senate?

A. Yes, I have. I served as chairman of the Senator Governmental Committee. I served as chairman of the GA Committee and probably a few more I am forgetting.

Q. Senator Governmental Affairs, is that the committee that would get the reapportionment bills?

A. That's correct. I was chairman of the

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[105] Q. Okay. You touched briefly on this. Would you specifiy what criteria you used or intended to have that the Senate used in putting together your bills?

A. Sure. Looking at the criticisms which were left with the last map, I wanted to make sure that we didn't do what we did the last time as far as going in and just scooping up a number of African Americans in the state and combining them into a district. I told Mr. Koepp that I suggest to you that you use a district which is somewhat traditional in this data and gave him the Eighth Congressional District as one he might look at, not knowing exactly what was going to come out of that; but knowing there was a lot of traditional there in the district. I believe that I even asked the staff a map of the most recent eight congressional district. I don't think that the district that was drawn for another Senator used the new eight. I think he used the old eight, but I know my information to him was to use the new eight district. He brought back a map to me and the percentages were such that they were about, I believe, not quite 52 or something like that. I looked at the [106] map and considered the Voter Rights Act. In section two and in section five, I said: Well, it appears to me that this district can remain compact and have a community of interest and you look at the predictors that are there and I think we can get the district up so that it does appear that a second African American district can be drawn. The district that was then returned to me that was presented in committee was about 59 percent in population, African American population. That district was reduced later by the Senate on the floor amended by committee. So, that the district that was presented was less than 59 percent. It was closer to 55, 56, somewhere in that neighborhood.

Q. You mentioned compliance with the Voting Rights Act. Were you aware of the requirements of both section five and section two of Voting Rights Act when you were engaged in this process?

A. Yeah, section two deals with trying to level the playing field and making sure that there is an opportunity to have a minority candidate of choice elected in section five which is maybe a more controversial section challenged by, from what I understand, a lot of constitutional challenges which deals with an area reserved more towards the state as [107] far as making sure the election laws, voting requirements were such that that level of playing field was there. But the last time I checked, it had not been overruled by the Supreme Court.

Q. By the compliance in section two, what factors do you recall that you look at when you put together a reapportionment plan to be sure you comply with section two?

A. Well, we look at the Jingles case and there is a three prong test that's used and what we look at is whether or not it is sufficiently large enough in geography, whether or not the minorities in that district tend to have a political cohesiveness, and whether or not the white block vote can thwart the intentions of the minority vote.

Q. When you were in the process, during this process, did you conclude that under Jingles, the state would have to draw, come up with a reapportionment plan with two minority majority regions?

A. Yes. Understand when I did that, that was

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[108] Q. Okay. In drafting a plan or considering a plan, incumbency, considerations of incumbency come into play?

A. Not until the plan got to the Senate floor. On the floor, there was an indication that in trying to gather votes in, count votes that there were a number of house members who were concerned about congressman Hays and how he was being treated in the Lafayette, St. Landry

Parish area. The plan was [109] amended because there was an indication that there was a block vote that was common or had a certain commonality to the voters that were already in representative Hays' district. I don't believe they had ever been recommended by Congressman Hays; but evidently according to MOA patterns and the facts, it was majority block of white voters. That plan was amended to consider his incumbency.

Q. What about your idea of discrimination?

A. As I stated earlier, I did not want to make the same mistakes that had been made with the earlier plan. So, in reading Hays' decision, we realized that in addition to looking at common interests and whether or not there was political boundaries and geographic boundaries being respected along with a level playing field, there needed to be attention going to whether or not there was no lack of compelling state interest and making sure that there was racial fairness; and I think given this state's history, operation discrimination, that there is, in fact, a variety of compelling state interest.

Q. And did you move to describe what you see as this, the history that of discrimination that the state needs to correct by enacting two minority district plans?

[110] A. Well, we always look at certain indicators; and I think that when you look at the high level of unemployment among African American population and the low level of education that's being received as well as the political tendency to vote along racial lines, I think that you can say there is still a lot of racial discrimination in this state. In fact, it scares me when I think that a former leader of the Klu Klux Klan was second in voter confidence for the governor of this state is concerned. I don't have to look too far to ask the question as to whether or not there is still racial discrimination in this state. I have a brother who ran for judgeship last year, and basically

there was only three people in the race—my brother, a black male; a black female; and a white male. He didn't campaign. He didn't spend any money, and he finished second in the race and got almost 75, 80 percent of the white vote.

JUDGE WALTER: How would assuring a second black congressman or relatively assuring cure that, cure bad education or cure poor economics? How will that do that?

THE WITNESS: Well, I think, Your Honor, that maybe somebody a lot more eloquent than [111] I, Martin Luther King, who gave us the balanced speech indicated that if you give us the ballot and we will be able to elect our own representatives, we will cure the racism of the past.

JUDGE WALTER: Not to say Dr. King so eloquently put it in the content of their heads and hearts, not the color of their skins. What I am getting at now, you tell me that a compelling state interest in assuring the election of a person of a particular race in this case will somehow cure racism and poverty and lack of education; and I am asking you how?

THE WITNESS: No, Your Honor, I didn't say that it guarantees electing an African American.

JUDGE WALTER: It increases the probability?

THE WITNESS: No. It empowers the minority in this state to elect the candidate of their choice whether that person be Hispanic, black, or white, the person that greatly shares their interest.

JUDGE WALTER: How will that cure the compelling state interest in having the better education and a fairer share of the economic pie? How will empouring an additional, how will empouring to use your term—I would rather use mine, helping [112] to ensure the election of a second black in the Senate, how will that cure those two terrible problems?

THE WITNESS: It doesn't. Maybe I am not being clear, judge; but it doesn't have to ensure electing a second black. It only has to ensure that a community which has been deprived can elect their person of choice to either a Senate seat, a judge seat, city council seat.

JUDGE WALTER: One problem on the plate at a time. Congress is what I am looking at now. I don't understand how Act One will cure the problems that you have, the real problems that you have enumerated as your interest in enacting Act One. I don't see how it is going to help do it.

THE WITNESS: Well—

JUDGE WALTER: Tell me how?

THE WITNESS: I thought I was. There have been tremendous strides since they have been able to get the Vote Amendment 15. Today I am a Senator in the Louisiana State Senate. I don't think that anybody when I was growing up would have ever dreamed I would be helping to make the laws.

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[113] THE WITNESS: No, I don't think so. I think that the Voting Rights Act helped to create a level playing field. It helped to make sure we had opportunity, but I don't think that it made anything sure.

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THE WITNESS: And we used all the guidelines that we were given by this Court to draw [114] a district. And we thought that we complied with what your guidelines and if I am interpreting them correctly. Yes, you can consider racial fairness; but you cannot ignore the geographical and political make-up of the land. You cannot ignore parishes. You cannot ignore commonality. You cannot ignore compactness. I thought we included all this in our consideration and presented what we were by law required to do in reapportion, and I think that we did an excellent job.

JUDGE WALTER: I guess I am really doing a bad job, but you understand you have got to explain it to me. I do not understand the compelling state interest of Act One.

THE WITNESS: Well—

JUDGE WALTER: Tell me what it is?

THE WITNESS: The compelling state interest is to—

JUDGE WALTER: Excuse me. That we are going to cure with that?

THE WITNESS: All right. It is to right the wrongs of the past. You have asked me how does Act One help with this. I think that's what the sticking point is, assuming there were wrongs done in the past. I don't think that if we had black [115] legislators in the 1960's that I as a child would have ever had to walk up to a water fountain that said for colored only. I don't think if we would have had African American legislators in the 1960's that there would have ever been a sign that said: Coloreds can't go past this point. I think because of the progress we have had in the political system and because we have been able to increase our voice in the minority, that's what helped cure these absurdities of the past.

JUDGE WALTER: Aren't those carefully—well, we have done away with the legal segregation as far as I know of any kind; but now we are talking about this act to produce these results. Are you telling me that because of the terrible history of the, most of the 200 years of the republic, that office is owed to people because of the color of their skin?

THE WITNESS: No, sir. I don't have to go back 200 years to tell you that there has been discrimination in this state and continues to be discrimination in this state, that the political cohesiveness of the minority population in this state is what's helped to remedy a lot of the discrimination in this state.

[116] JUDGE WALTER: Yes, sir, but legal discrimination. We are talking about legal discrimination. I am asking about Act One because that's all I am looking at. I mean, that's all that's on our plate. I guess I am being obtuse, but I don't understand how Act one is going to right past wrongs.

THE WITNESS: I can't think of another way to answer the question, judge, other than the way I have already answered.

JUDGE WALTER: Meaning to say because of what happened?

THE WITNESS: No, because the minority population can continue to be empowered. They can better able play on a level playing field when it comes to politics, economics, social interests, educational interests. The African American population in this district that has drawn have a commonality of interest when it comes to education for their kids, when it comes for the type of health care their kids receive; and if they can go to a person who shares their interests whether that person is white, Hispanics, Vietnamese, or whatever, they have an opportunity.

JUDGE WALTER: It is not the color of [117] the skin; it is the interest?

THE WITNESS: I don't disagree with that, judge. I am saying to you that the percentages and the political cohesiveness help to ensure the candidate of choice regardless as to color of that candidate's skin and gives the community an opportunity to evolve because they have access.

* * * * *

Q. (By Mr. Mongrue) Okay. I think you mentioned earlier also that you had mentioned the Eighth District and

The preservation. You were concerned about the preservation of the historical districts in the state. Was that a consideration that was given to in drawing the plan?

A. Yes, absolutely. We tried to start, have a starting point which was traditional in nature; and certainly when I looked at a map of the Eighth Congressional District which was represented by Congressman Long, it certainly did go from the [118] northern part of the state with that west to east swing all the way, I think, into Lake Ponchartrain.

Q. Okay. And the plan that you introduced, Senate Bill 3 is not adopted. Actually Senate Bill 1 was passed. Would you tell us what the difference was between your plan and the one that was actually adopted?

A. My plan I think I was a little concerned about the packing that the Hays' Court had referred to in keeping the percentage around 54. My original plan was close, I believe, to 59 percent; and the plan that was on the Senate vote was somewhere to around 55 which was as close as we could get to 54.

Q. And 55, in your experience as a politician in the state, at 55 pecent, do you think that created a safe district in which minorities will, it will assure the election of minorities; or is it a competitive district?

A. I think it is a competitive district. It allows a minority an opportunity once again to elect a candidate of that choice.

JUDGE SHAW: Where did that 4 percent go back to basically? Where did it come from, and where did it go to?

THE WITNESS: I believe the Lafayette [119] and St. Landry areas were included in the amendment to take care of the incumbency concerns of Congressman Hays mainly reduced the percentage because most of that population was white population. There was some other shifting in my plan. Sabine Parish, I think, was also removed; and that changed some of the percentages around. The plan was amended in committee and then again on the Senate floor and the amendments changed the make-up of my plan from 59 to about 55 percent.

JUDGE SHAW: Are you saying there are sufficient areas in St. Landry where you could draw higher percent of the blacks to put in the districts that are not in District Four now that are available nearby?

THE WITNESS: There were places along the Red River where we could have gone in deeper to increase the percentages of black, but what would have given us concerns about narrowly tailored. So, we decided not to do that.

* * * * *

[125] Q: So, those consideration drove it from perhaps the statistical minimum of a majority minority district of another whatever 56 to 59 would be percent population; is that correct?

A: The 59 percent, and I wish I could tell you what the difference was in 3 percentage points after we put it to the floor, but I do know that Sabine was one of the reasons leaving it, you know, putting it out, reduced the percentage that was a black population in that parish. And I believe I had included it in my district in my act rather or my plan in the District Four which would be the second minority district; and I think taking that out as well as making the changes that we made in St. Landry and Lafayette reduced the percentages. Understand when you are constructing this, you are trying to put it together to get 20 votes as well.

Q: So, did the political necessities impact [126] the increase of the minority composition of this district from what would otherwise have been the 56 percent level up to the 58 or 59? Are those political interests that are causing that variation in the district?

A: The political necessities insofar as considering third party issues such as incumbency, yes.

Q: Was there an incumbency benefit from increasing the percentage minority in this area?

A: No, there was an incumbency benefit for decreasing benefits from Congressman Hays.

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[131] Q: Was that description of—well, is the relative geographic layout relevant to you in determining whether or not you believe this district is compact?

A: Yes, and the way I determine that is that one of the complaints that was given about 42 was that it was going to be near impossible for anybody to campaign in the district so large and so spread out. [132] So, I thought it made good sense to take a district that had already existed in Louisiana that had been represented by a caucasion congressman by the name of Gillis Long and use it kind of as a starting point since there was some tradition there already.

* * * * *

Q: Thank You. Is it also true that an amendment was presented during the debate either in [133] the Senate committee or the Senate floor that included a majority minority district of 55 percent or larger that went no further north than Rapides?

A: That I don't recall.

Q: You don't recall a plan that was 55 or more percent registered voters that derived that construction in the region between Rapides Parish and would be St. Charles Parish?

A: No, I don't. I don't remember that.

Q: Are you familiar at all with a proposal that has been attributed to Senator Ewing and or Senator Bankston that would meet that description?

A: Oh, there was one that dealt with 55 percent population but not voter registration. See I tend to think in terms of voter registration. That might be where we are having the difficulty in communication. There was no plan that was presented that I recall in the Senate floor that were 55 percent black voter registration.

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[136] Q: What recommended the Eighth district to you as a discovery in the consequences of redistricting Louisiana?

A: It was recommended to me was that once the Act 42 was declared unconstitutional, we knew we had to start from a different standpoint. I thought that maybe the best way to do that was to take a look at some of the old maps and see how they were drawn. Once I looked at the Eighth Congressional District, I said: Hey, this is a good place to start.

Q: When that Eighth District first recommended itself to you, you were unconcerned with the creation of a second majority minority district; is that correct?

A: When the Eighth District recommended itself to me, I was as concerned about the creation of a minority district as I was about meeting the other court test.

Q: So, it was one of the material factors that you were considering in the Eigth District recommending itself to you?

A: It was a material factor. It was not the sole factor.

* * * * *

[137] Q: You have indicated your interest in creating a majority minority district was one material factor that you considered. Were there legislators that had one material factor they were considering is that they wanted the Sixth District represented by a Republican to be 80 or 85 percent white?

A: There were many considerations by several legislators. Some wanted majority, supermajority white districts. Some wanted to make sure there were more districts in the north. Some wanted to make sure that we had an opportunity to elect more Republicans. The concerns of the legislators went down as small an interest like making sure Baton Rouge was contained all in one district.

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[140] JUDGE WALTER: What I am getting at is your compelling interest. I am trying to figure out what you think will happen as a result of Act One. I am concerned, it appears to me that when we do something like this, we ensure voting along racial lines. That forever as long as Act One lives, District Four will vote along racial lines. So, [141] you know, it is using separation to fight separation; and I am trying to understand: Why will this stop that? Tell me what good comes of it?

THE WITNESS: Well, judge, maybe I can answer it by telling you I have several colleagues who asked me a similar questions about: Why is it that we don't live a color-blind society? Why is it that we have this emphasis on race? My only response to them is: It seems though when we live in a color-blind society, the blacks are ignored, that blacks don't get promotions, that blacks don't get elected, that blacks don't get opportunities; and that is the answer that I have for you, that part of what happened happened in a society which did not consider race and now that we have a consideration, now that we have an opportunity to give a voice to the minority population, it ensures them at least an opportunity to put into power those persons that will share that interest.

JUDGE WALTER: You are not saying that whites aren't concerned with those very things, are you?

THE WITNESS: No, I am not saying that whites won't be elected by blacks.

JUDGE WALTER: You are not saying that [142] blacks won't be elected by whites?

THE WITNESS: Well, that hasn't happened in this state.

JUDGE WALTER: Give you Lake Charles in 1965—the at-large districting within the city of Lake Charles and one seventh of the city council was black. I mean, it doesn't happen often. I am not saying that, but it does happen. Don't say it never does.

THE WITNESS: If I indicated that, I apologize.

JUDGE WALTER: Carl Stewart from here, James Stewart from here, Paul Lynch from here to the judiciary. I mean, I can give you those. Tell me. What does Act One, where is it going to further us? What compelling state interest does this further?

THE WITNESS: I don't know if I can answer your question any different than I have, judge. There is and has been and continues to be racial discrimination in this state; and it is believed, we, the minority population, the African American population in this state—if I may speak as one of its representatives—that the way to overcome that is to put into power those persons who can best share an interest, help make the laws, [143] help enforce the laws. To me, it is simple and clear-cut; and evidently I haven't been able to close that line and answer it for you. But I can't use any different words than I have already used.

JUDGE WALTER: What bad things will flow from not having a second majority minority?

THE WITNESS: Well, the opposite. You have less of an opportunity. You have less of access. The playing field is less level. There have been those who have stated that influentials, so-called influential districts might be more to the advantage of minority population; and perhaps we are cutting our throats, our wrists when we created districts that are more majority minority. I think when you look at the affect and the success of those districts that have been referred to as influential districts have had, I would prefer to have a minority majority opportunity of election of choice of candidate or candidate of choice.

MR. MONGRUE: Can I follow up on that?

JUDGE WALTER: Yes. That's why I interrupted you, so you can follow up.

Q. (By Mr. Mongrue) You are from Orleans Parish; is that correct?

[144] A. That's correct.

Q. You are aware of the serious problems with crimes and drugs and poverty in inner city Orleans: Is that correct?

A. That's correct.

Q. And you have now a congressman from Orleans who is African American?

A. That's also correct.

Q. And can you maybe as Judge Walters just explained what that does to help improve the situation of the African American community in Orleans by having an African American congressman representing them?

A. Aside from the fact of just the role model and the fact you have a certain pride in somebody of the same ethnic make-up that you are has attained that high and prestigious goal, you also have an individual who has been able to secure funding for the City of Orleans that we have not had before, like we have not had before I should say, an individual who understands the importance of getting money to the educational system in Orleans, an individual who understands the importance of getting money back to help fight the crime. Presently the mayor of Orleans is under [145] consideration for, I think, about $100,000 as far as being able to hire more policemen; an individual who grew up in the community and understands and shares the interest and the needs of the African American community.

Q. Likewise, in the Red River boundaries, so to speak, where there is a community of interest of African Americans who suffer from poverty and crime and drugs, having a congressman represent them, wouldn't you think that that congressman just like all congressman will try to bring benefits to their district, would be able to bring such things as more money for the schools, health care, civil rights legislation? Wouldn't that –

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

RAY HAYS, ET AL, PLAINTIFFS

versus

STATE OF LOUISIANA, ET AL, DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

Proceeding held in the above matter on the 22st day of July, 1994. Morning Session.

* * * * *

[3] Witness: Senator Armand Brinkhaus

Q. Good morning, Senator Brinkhaus. Would you please give your name and address for the record, please.

A. Armand J. Brinkhaus, Drawer E, 664 Napoleon, Sunset, Louisiana 70584.

Q. And you're a member of the State Senate?

A. Yes.

Q. How long have you been a member of the Louisiana Legislature?

A. Since 1968.

Q. Could you give us a brief background of how long you were in each body and what chairmanships you've held, etc.

A. In the House side I was there from '68 to '76. In '76 to date currently in the Senate. In the Senate side I have been chairman of education from '80 till a couple of three years ago where I then switched over to Chairman of Senate and Governmental Affairs, and just a number of other committees but those are relevant.

Q. The Senate Governmental Affairs Committee, is that the one that deals with reapportionment matters?

A. Yes, among others.

Q. And in the Second Special session this year in which [4] Act One was passed, were you the Chairman of the Senate and Governmental Affairs Committee at that time?

A. Yes, I was.

Q. And you obviously participated in the process of reviewing the legislation that was addressed?

A. Yes, sir.

Q. You also authored Senate Bill One which ultimately was passed as Act One?

A. Yes, and I had another bill besides that, but Senate Bill One was the one that we passed.

Q. Could you briefly give us background as to how Senate Bill One came into being?

A. The delegation had been sending word to various members of the staff of the Senate, and me in particular because I was chairman of the committee, and at some point or time was sent what I call a color map.

Q. When you say that the delegation, you're talking about the congressional delegation?

A. I'm sorry. The U.S. Congressional Delegation is what I was referring to. At some point in time I was told that Congressman Baker's office would receive in Baton Rouge and deliver to somebody at the Senate if not to me. I think I—I don't know if I received a faxed copy of that because it was colored.

And when we looked at it and had conversations over the [5] phone and even person to person with at least four members of the delegation in person and some of their staff, in conversations it occurred to me that that plan that had sent—it's been said is what we actually did which is imprecise or incorrect as I see it.

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So bottom line what I did is tell Mr. Koepp I said, look, why don't you do this. Take their plan to the extent [6] it's possible but consider the things that we must, one man, one vote, consider Shaw versus Reno which had come out since Act 42 as well as the articulation in Hays versus the State of Louisiana. And keep in mind all the things that we know because we've been through this reapportionment with the Legislature, did it, and had it thrown out and came back and did it again. We did with the Congress and now that's thrown out and we've come back again. So there's been some compilation by Koepp and others that's been used nationally and certainly in Louisiana.

Take all those principles of reapportionment, stick them in, due regard to each one, one man, one vote the Thornburg Gingles, the Shaw versus Reno and the Voting Rights Act as it was amended and all those historical things that are applicable now and mesh in the Hays versus State of Louisiana decision to fit these thngs. We knew some things both in terms of the way their opinion was written, it's clear what we needed to do, don't do what we did, do it a different approach. So that's why I had asked him to draw up a plan in that fashion which ultimately became my Senate Bill One.

Q. Okay. You mentioned that you had given Mr. Koepp all these instructions in compliance with all these particular factors. Did you know if there was any consideration given to, for example, one of the factors that this Court had [7] talked about in Hays religious and ethnic makeup up of the state?

A. Yes, but let me qualify that. One man one vote that we all, or at least I do, considered to be—at least takes precedence over all others esentially. When you go to one man one vote in the State of Louisiana, when you drop from Eighth Congressional districts that five hundred and a few thousand, go to seven, that's six hundred two or three thousand with no permissible deviation except maybe the remainder of the precinct to make it have a whole precinct in a district. On that you will cut across every demographic figure or idea that you use in doing reapportionment.

When you look at it one of the things I found to be a great advantage like a revelation is to look at Koepp or our staff at the computer graphics thing where he enters in and we start with what I call the what ifs. Let's do this, put in all this stuff, come up with something, and then if we move this—see it happen in vivid color literally where you are, then you find out all those things that you wanted to do you simply can't do because of any number of reasons.

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[8] The point of all this is you have it randomly [9] throughout the state, not like in some western states where the whole state was laid out in this fashion before. I think an Act of Congress requires it in conjunction with the census bureau and those things to do the '90 census. Each precinct then had to become, unlike past precincts a visible boundary. And where you mesh all these things, roads were on property lines, streams the way they were, and you tie them in, you'll have—I can't name a precinct in particular, but I can recall clearly seeing some. You'll have one runnig off two miles into the distance to a point where two bayous converge and there's no one living there, yet it's in there and if you put that into a district, whether the school board, police jury, city counsel, state legislature

or congress, you're going to have that point sticking out. And it's going to look funny. But, I mean, it's easily or readily explained.

Q. Okay. Do you know if any consideration was given to past reapportionment plans that the State of Louisiana has enacted?

A. Absolutely. In conversations with, I guess Koepp if not others, certainly with him, Glenn Koepp, I asked him what in the world have we done in the past because I know specifically about the 1972 congressional redistricting. I was involved in back room conversations in arriving at it, and particular reference being made to the Eighth [10] Congressional District because foolishly I did run in that district against Gillis Long in 1972, lost handsomely. But knowing that and what we had changed from what had been in the '60s thing and I think I was told that – I know I had the displays made for the Senate presentation. It's labeled 1970, '72, '80, '90, Act 42 I think, and then the current Act One on that. To look at those – because I do things better graphically.

But anyway, I asked Koepp to work that up and he did do it, he put it on the computer. It's not going to be technically precise because precincts today are not what they were then. Some of the data is simply not available but you can make some assumptions and come out relatively accurate as to what they were.

Q. And the district that was created in Act One do you see that as being very similar to the older congressional districts?

A. Yes, and let me explain how I'm telling you that. Go back to one man one vote and we're reducing from eight to seven and going from 525,000 or whatever in each of the eight districts to 602 or 3,000 in each of the seven on that. And then you say, now, what are we going to do. So you do the what ifs on the computer thing. This is what you come up with. It makes the most sense, it's practical, I think it's fair.

[11] The other Brinkhaus bill, doing the ideal to take care of the Cajuns first and then let the rest of the state go disrupted—Bob Livingston, disrupted Richard Baker's, two republicans, and I think that's one of the constraints. You cannot undo the other party, you must accommodate them.

So when you consider all these things and not disrupting other districts extensively—but remember, we have to disrupt them because of going to seven with 602,000. This is the result. It's the most sensible and fair way to divide it.

Q. Okay. In drawing the district was race taken into consideration?

A. The whole plan?

Q. Yes.

A. It's one of demographics, it's a demographic item that you take into consideration. I cannot tell you no we didn't. I mean, yes, we do. We've always done this.

Q. In order to comply with federal law the Voting Rights Act, you have to consider it; is that correct?

A. Well, you can add that in, too, just as a practical reality when you go in to do a reapportionment and I've experienced at literally all levels indirectly both below the legislative level, State Legislature, but it's a demographic factor. And certainly the Voting Rights Act as last amended I think requires that that be a factor put into [12] it, not simply to be looked at and then said, oh, well. You know, look at it and do something about it.

Q. You mentioned earlier that you had told Mr. Koepp to consider the Thornburg verus Gingles factors under Section 2 of the Voting Rights Act, let's go through these factors. First the Thornburg factor that minorities are geographically compact such that they could be placed in a majority-minority district. Do you bellieve that that's the case in Louisiana for your Fourth Congressional District?

A. Considering all the things that we are requird, constrained, whatever by cases, by statutes, U.S. Supreme Court decisions, my answer is yes. When you put all these factors in, when you take one out of the context of the litany of things that you're required to do, whatever that is that Koepp keeps telling me we've got to do on that and say we look at compactness based on race or not, well, none of these districts are compact, the exception probably being Bill Jefferson's district, whatever that number is and Bob Livingston's, whatever that number is, because they're close by, either adjacent to Lake Pontchartrain, New Orleans, and those parishes. When you get out of that there is no way for them to be compact even if you go back to the historical prospective, which is why I wanted to make the comparisons here. Were they ever compact? No. You take the number you've got to divide into the state's population, then you [13] start doing something about it.

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[14] JUDGE WALTER: Now what I want to know is what are all those other facts that you had to consider? You told me the looks of the deal for one.

THE WITNESS: We can't take any one district, no one can, and make it – I don't want to be facetious about it, but goody-goody for me or anyone else which is in my other Senate Bill in the Cajun area. I did what I wanted for that, but it disrupted the rest of the state. The point I'm [15] making, when you do a neat compact, any kind of a district, black included or minority-majority district, you're not going to have it neat in Louisiana given one man one vote and the fact we have six other congressmen in areas that you've got to deal with.

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[17] JUDGE WIENER: Did you consider and did you tell Mr. Koepp or was that in the conversation that a second district, the one you're talking about and look at the Eighth, wasn't it or was it not an assumption that this was going to be a black majority district?

THE WITNESS: If it was sensible with all of the legal constraints—

JUDGE WIENER: If it could be done?

THE WITNESS: If it can be done and make sense—

JUDGE WIENER: And done right?

THE WITNESS: And doesn't look ugly or as ugly, then do it. And we ended up with that.

[18] JUDGE WALTER: Let me just finish the et cetera. The things taken into consideration were the looks of the thing, one man one vote, the obligation to some extent, the obligation not to harm minorities, and to do whatever is reasonable to enhance their representation. Anything else?

THE WITNESS: Well, then, as a last result we've got to pass this bill with a majority of the House and the Senate.

JUDGE WALTER: Practical politics?

THE WITNESS: Yes.

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[19] Senator, do you consider Act One of that district heavily overloaded toward South Louisiana like vote wise when you got most of Evangeline, St. Landry, Pointe Coupee, St. Martin, parts of Lafayette, West Baton Rouge, and Iberville Parishes, is the actual total numbers in votes, does that pretty well control this district without

regard to black or white or wherever? In other words, like those portions of Natchitoches, Red River, DeSoto, Caddo, are they pretty well left to the mercy of the Southern districts in this thing?

THE WITNESS: I didn't put exact numbers on it but my recollection of it was this: Are you talking about what we've called the second black district? I think that's District Four; is that what you're talking [20] about?

JUDGE SHAW: Yes, in Section 4.

THE WITNESS: In the balance and if we go back to—well, I'd do a comparison but let me just say this, the balance on Congressional District Four, in my judgement we had a fair balance, and let me tell you what we had in it. We had some urban areas southerly from Shreveport, Natchitoches might qualify in what I was going to say, but anyway Shreveport to some extent, Alexandria, and, Baton Rouge, urban areas. We also had extensive agriculture outside of these urban type areas.

And then the numerical voting. The lowest parish I think was Ascension. I don't remember exactly which one. And we went on up and I think ultimtely Sabine is in it or not, I don't recall what that great debate held, I haven't looked at it to be prepared to answer specific.

I think the numerical balance across that district when you put the combinations that are in there that no one area is going to have to deal with i.e. special interest or interests of those that are Shreveport, rural upper parishes in the state, agricultural concept which is essentially the same as we have in South [21] Louisiana except rice possibly all down through the lowest parish. And when I make a mental comparison that's why I keep using the Gillis Long District of 1972 as then modified in '80 as a result of the '80 census on that. It simply was moved farther northeasterly in the state than Gillis Long. Gillis Long started at Lake Pontchartrain. We came away from Lake Pontchartrain to overlay idea, took his northwestern side and moved it on up northwesterly farther.

So we just shifted the district. Now it may be somewhat longer, 50 miles or whatever than the Gillis Long district. But in there you've got the balance and I had an opinion even in the Gillis Long district that I lost in there, there was a balance. My failure to capitalize on what my balanced area was is not relevant and that means I lost the election. But, again, there was a balance. Rapides, Avoyelles interest. Then you had Evangeline, St. Landry, different than the river parishes. But those four parishes constitute about half of his population and the river parishes could have always had the united and they ran candidates to it.

I make a comparison today directly on to your question, Judge. I think in this Fourth District the [22] same thing is there. Three to four pockets of interest and another one also being majority-minority.

BY MR. MONGRUE:

Q. Senator Brinkhaus, one other fact I want to ask did you consider, did you consider the need to remedy the effects of past discrimination against minorities in Louisiana?

A. In the sense of the Voting Rights Act I think that's what we're called to address, that issue, and so my personal opinion or my opinion is I think that we do need to do it.

When we create a 55 percent by registered vote district we're only giving a minority candidate an opportunity to win in that district because when you consider turn out and fall off which I have personally done on St. Landry voting patterns probably starting in the 1960 races and did them all because when I get up to running and I have continued to do it. But when you look at what happens and I imagine happens everywhere, turn out in the minorities and then the fall off from the favor – if you have a sheriff running you get the maximum, a governor might also at the same time. You get down to senator, I'm running at the same time, you drop off 10 to 15 points. You get to the House member, you drop off. Get to the juror, they're voting for the juror probably more than they are the governor or the sheriff.

But, again, to have it fair, 55 percent gives them that when you consider the turn out and the fall off, and the [23] turn out of the whites being 75 to 80 percent traditionally and not as dramatic a fall off on those positions, I think then this sets it equal.

Look at Larry Bankston. We created a majority-minority district in that Senate district in Louisiana. Larry is white and he defeated black candidates. I'm assuming they were equally acceptable but he did win. And that's why it – take this thing – if you're going to give a reasonable opportunity given voting patterns consideration, you've got to have it over 50 percent and on registered vote at about 45 in that area.

Q. Okay. Let me ask you this. As far as compelling state interest do you believe that minorities in this state continue to suffer effects of past discrimination?

A. Absolutely. I mean, we still are doing things to get them in position of employment, in public employment, and I presume my involvement as a State Legislator has been public to try to help them which I have done on that. And I find now for example now that Senator Cravins is an adjacent senator in similar parishes, and we have two at least that are together, Representative Charles Hudson in Opelousas is black, he is now my House member. I see more of an effort by them with me leading and or helping them in accomplishing the goal of assisting the minorities in our areas, not just my district but in our areas, for public employment, for the [24] State Police, Wildlife and Fisheries, etc.

Q. Can you expound on how Act One passing of a plan that affords minorities a reasonable opportunity to elect a candidate of their choice to congress would remedy, help remedy the effects of past discrimination?

A. Again, I'll use my analogy. There will be two congressmen from Louisiana representing the minorities assuming that Cleo Fields would be elected in that district, we'll assume Jefferson is going to be elected in his district on that, that working together they can have a more pronounced effect for minorities and all of Louisiana in Louisiana and I'm assuming that would have a spin-off effect for minorities all across the nation. But if you beef up those numbers it will do it. I say that based on my experience.

In 1968 in the House Dutch Morial, the current mayor's father, was a member of the House. He fought a battle on a bill that really strikes and comes to mind, was to mandate a discontinuance of labeling blood, where you give blood and it would be labeled black blood or white blood, whatever color. And he had a bill in to prohibit that. It would just be blood in the type or whatever else was there. And the bill failed.

Q. At the time was he the only member of the—

A. Yes. There was one member in the entire legislature [25] that was black and that was in the House side and that was that.

Then in the '72 term or thereabout after as the numbers increased, ultimately we passed that bill on that. I don't remember the numbers of black House members in my '72 term, but in '76 when I went to the Senate, same situation, one black senator, Sidney Barthelemy. And except for the good will of some senators and it's more clickish and clubish, he made it a point, he had to be part of this thing and vote on some things I imagine he would have preferred not to in order to get us to consider black issues.

In '80, then you had—I think Hank Braden replaced Sidney Barthelemy. He had the become city council or mayor. Then you had Hank Braden and Richard Turney from Baton Rouge. Then you had four in probably '84, and now you have seven. And I can assure you—I don't know how to say this, but I'm called part of the Senate leadership. There's a heck of a lot more involvement directly of blacks in that leadership grouping, whatever that is, there are more committee chairmen today, not because bodies but they've moved them, you need to do it. Now maybe we've done some things on our own rectifying of past things. On committees of finance we've made sure that since '76 these, at least when Sidney Barthelemy came, he was a member of finance. We always had a minimum of one seat and now we have three seats [26] I think of eleven that are for minorities.

But with their numbers, the body, which is the goal of all this reapportionment, you've given an opportunity to somebody of minority to win, they win. Now, was that the goal? No, the goal is to go represent us and when they get to where they represent us, the bodies I've been in, those additional numbers give them a much more effective dealing wedge to deal with the majority of that body.

Q. And more of an ability to pass or influence legislation that has a specific effect on the minority community?

A. Absolutely. And I'll give you an example, another comparable away from blacks. We had Virginia Shehee was in modern times—I say modern, in the '50s a lady senator. She served one or two years. But she would on occasion go to a microphone and tell us men, the other 38, something from a woman's viewpoint that we never even thought about. It's not that we didn't care, we never thought it. Men don't think in these terms. Diana Bajoie is in the Senate now, Virginia is out. She too has gone to the microphone to remind us of things just on occasion. Not really big deals but the prospective and maybe the gentleness of a woman.

By the same token you make a comparison. And my direct experience with the minority there it's a lot easier – rather than one voice alone versus 38 others or one of 105. When you have a number, an effective number to deal with [27] that body on that where they've got to deal with you, you will get benefits for your concerns.

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five – I'm trying to remember the numbers that I was told. Somewhere like 10 percent would be probably the least minority in the 20s, 26 or 27 I think. I think the McCrery district has about 25 or so but it's in some of this data that we had in Senate Bill One.

The Eighth District is probably 9, 10, 11, 12 percent, and that would be the least impact. But, again, when you consider his area of broad based Catholics, liberal prospective on that, and strong communities of minorities in Rayne in Acadia Parish, in Crowley in Acadia Parish, in Jennings, in Acadia Parish [28] as well as Lake Charles, he cannot ignore that because he'll get wiped out in those communities. Their voting patterns as my experience has been, something like 90 percent of those who go vote are for their candidate have been the recipient of that. Like getting eight hundred and something votes at a precinct to ten for the opponent. That's an example I'm talking about.

But again, no elected official if they have a lick of sense that wants to get reelected can ignore a 10 percent and as you go up it certainly would be greater districts.

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[34] positions shows the dramatic thing. It's 55 percent registered voters what it is to make it effective, so it's level playing field. And that's why I mentioned the

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[39] Q. The area that was the old Eighth even before Gillis Long that was – I'm sorry, before Holloway that was the Gillis Long district, do you know how many parishes that construction split?

A. In '72 when we created that Eighth Congressional District, there were 14, 16 parishes involved in it. 14 whole, two parts as I recall.

Q. So there were two split parishes even in that construction of the old historic one that you wrote?

A. Yes, and it was split parishes in each of the other congressional redistricting from the exhibits marked – I mean, dated 1970, '72 and on through, parishes were split.

Q. Excuse me.

A. Yes, parishes have been split prior to 1972.

[40] Q. But on that construction, you had two out of, I think you said, 14 parishes or 14 plus two portions?

A. Plus two portions, what I recall. I don't remember all of them, but I think Livingston and another one were divided.

Q. So that's a little bit over ~~10,~~ 15 percent of the parishes included in that old district. Two out of 14 or two out of 16, however you want to do it, was all the split proportion that you had in that old district?

A. In the '72 district, yes.

Q. And then in Clyde Holloway's district which would be the '80s.

A. The one in the '80s, I think there were more parishes that were split. Allen Parish was the other one. Initially in the '72 when it had Oakdale I believe that area and then in the '80 '82 – well, we had to come back and redo it in '82-'83.

Q. When I'm speaking of the '80s, I'm talking about the post Major V Treen, the one that stayed from the early '80s through '90.

A. The one that was the result of the Treen. When we came back and did it again my recollection is there was more of Allen Parish in it, in that northwesterly branch, if not all of Allen Parish, but it was some other parishes that were divided and I don't recall. I no longer had a direct [41] interest in being involved in it.

Q. You had lost all of your interest in running for congress?

A. August of 1972, I no longer had an interest in it.

Q. Is it fair to say that that district may have had only—do you have any reason to disagree that that district in the '80s that Representative Holloway served, may have split as few as three parishes in that construction?

A. I don't know.

Q. Now, this construction that we have today, do you know how many parishes it splits?

A. Not really. Several, but it—the Act One does not come close to cutting as many as Act 42 did, which what we had come back home to reassess after Act 40 was held unconstitutional, we addressed it with Act One and reduced parish cuts as much—much more than Act 42.

Q. Do you know how many parishes have at least a portion in Act One Fourth District?

A. I couldn't tell you that.

Q. Do you know what—is it fair to say that there may be as much as 12 or 13 parishes split in this construction?

* * * * *

[43] Q. So would you—it is obvious that this splits substantially more parishes than any other construction of the old Eighth; is that fair to say?

A. Yes.

Q. Are the splits based on that commitment or that desire, that goal that you had of also constructing this district so it was a 55 percent registered minority district?

A. It was part of those things that I told Koepp to direct it to. What we had by using, let me call it the extremes,

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[45] Q. As it relates to the splitting of these parishes, you had also mentioned the racial construction was one goal.

A. Yes.

Q. Did the splitting of the parishes in this way add and serve that goal in meeting the 55 percent minority construction requirement?

A. I didn't do it myself, but I'm going to assume that would be a valid assumption since it ended up being with a 55 registered—percent registered vote.

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[46] Q. Do you have any knowledge of the little finger that just—there's a hook up from the district that would be Representative Hayes', I guess, District Seven that comes up and then there's the little hook finger that comes underneath it for the Fourth; do you have any knowledge at all that this—and it is in the St. Landry area, the St. Landry Parish. Do you have any knowledge of the residences of that neighborhood?

A. My recollection?

Q. Racially?

A. Yes. I think that that's Ward 3—parts of Ward 2 and 3 in St. Landry Parish and I've forgotten the specific [47] purpose except to meet the personal requests and insistence upon the Acadiana delegation that we have maximize the return of the Seventh District to what it had been historically way back with Evangeline, St. Landry to the extent it could be restored to it and in accommodating that as well as to accommodate the Fourth District in Ward 3 area is dominantely white and to get across in that area where the prone goal is to, you came through Ward 2 in St. Landry Parish which was some 50-50 precincts in there.

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[50] Q. Would it be surprising in your understanding of the construction if it was a substantial difference in the racial construction of the component put in the Fourth in comparison to the component put in the Sixth?

A. It's possible and then it's by logic and if you look back, the Fourth is 55 and whatever the Sixth is—that percent I think is around 18 or 20 or something percent on that. That proportion would be there but maybe not so you'd have to look at the precinct to see what its numbers were which is what that computer looks at.

Q. Correct, but cumulatively getting it accomplished to maintain that 55 percent, it's not going to surprise you as divisions occur that the divisions that result in both the grouping of minorities on one side of the line and the grouping of white citizens on the other to maintain the numbers on both sides; is that correct?

A. I think it's a logical conclusion that one can make. Additionally, unless you—

Q. So you cannot ignore both sides of the line?

A. Yes, that it is a logical conclusion. On the other hand, it could be that in the senate size, that the senators involved in those precincts simply did a political option of [51] what was in and out and I don't know about this and we don't know unless there's some specific testimony from the floor of the Senate or the committee, Senate committee on that, an amendment offered or a change suggested and that happened. I'm told it happened in a number of places. On another bill another time, I got a certain precinct kept in my senatorial district because my mother-in-law lives there. I eat the one home cooked meal I get a week at her house.

Q. But cumulatively regardless of the idiosyncratic that the isolated moving of precincts back and forth for good supper or residences of in-laws, cumulatively, the line had to maintain the minority construction on the Fourth side and place the white citizens in those areas cumulatively on the other side of the line in the Sixth district; is that not correct?

A. I'd say the effect of what was done with the reapportionment, that would be a fair statement.

Q. You did propose, I'm not sure that you actively pushed it as a plan, but you did include Senate Bill 2 that was referred to, I think, in the committee hearings as your purely regional plan.

A. Senate Bill 2 was the other Brinkhaus Bill?

Q. Yes, sir.

A. Oh, absolutely I did. And I did it to be counter—the Thompson plan which in my interpretation are words to [52] describe it to be his north Louisiana fix us up plan. I said well, fine. I'll start one which undid the rest of the state, as a figure of speech. I'll do one that takes care of my [C]ajun area and let it fall where it may.

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[58] Q. Right. I'll save us from some of the maps for a little bit. You had talked earlier about your thinking on why you were attracted to the 55 percent level or justified it in your mind based upon I think you said turn out and then drop off?

[59] A. Yes, fall off.

Q. Fall off, thank you. So you were beginning at a 55 percent registered, I believe, or 55 percent population.

In your mind what were you speaking of, where were you beginning in that analysis in your own mind?

A. My recollection is that it was registered votes.

Q. So we're starting—in your mind you were starting at 55 percent and I'm asking about Senator Brinkhaus right now not the legislative body.

A. Senator Brinkhaus half of it was to have 55 but no more than 55 percent registered and preferable right under it and again my recollection and I do not have my personally marked up by me copy of the first Hays decision, I have someone else's marked up and I can't locate it, but there was some language in there that the 65 percent—

Q. 55?

A. No, no. In Act 42 was exesssive and I had gathered the 55 percent registered or less but in that area was permissible in the sense of I further recall and understood from the first Hays decision was that there had been some testimony saying that a second majority-minority district could be created with about 55 percent registered votes. I have sought for it on the computer through Koepp. We didn't find this neatly compacted one. We found this one, less than neatly compacted but it was articulated by the Court [60] that the testimony had been they could do a neater one and I have never seen a neater one with 55 percent for the majority-minority.

JUDGE WALTER: Excuse me. Are you telling me that you cannot draw a neater one with a 55 percent majority-minority?

THE WITNESS: I'm telling you I don't think you can because I asked Koepp to computer-wise try to find it. We had invited Mr. Hurd and his clients to come to the committee to present that thing that I thought had been mentioned in the Hays decision to us so if there was a second one that we could do more neatly compacted than what we ended up doing in Senate Bill One we would look at it. No one came forward with one that could be done. We couldn't find one. We couldn't create one.

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[61] JUDGE WIENER: Let me ask one other variation on that. If had you worked with Mr. Koepp to draw the 55 percent, Judge Walter asked you about more compact, neater and so forth and had impractically but theoretically removed incumbent and partisan politics as a factor, do you think then you could have drawn the lines?

THE WITNESS: I really don't know but I do not think that the incumbency or party was relevant for what ultimately was Senate Bill One.

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[62] THE WITNESS: Senate Bill One, Act One, when I say for me because that ultimately became the law with some precinct changes for whatever those reasons were. But it was, and I mentined it earlier and I don't want to be redundant with that, but not to undo the three republican office holders, to be fair to them, and all other things I've already said today, so that I don't think the consideration about whether Cleo Fields lived in it or out of it was relevant.

JUDGE WIENER: I'm getting mixed—hearing mixed things. First, I thought you said that incumbent and partisan politics were not relevant. Now you said about the three republicans.

THE WITNESS: Okay. As a specific precinct decision, they were not relevant I don't think unless Koepp did something and didn't tell me about it. My instructions to him were to address the needs of the seven congressmen.

JUDGE WIENER: That gets back to my question.[63] Take that out of there, could you do a neater, more compact?

THE WITNESS: I don't think so.

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[68] Q.Now, we had talked about your personal feeling for 55 percent registered being appropriate and you have identified three factors that cause you to suggest that 55 percent only provides an opportunity for a minority candidate to be elected, not a guarantee. Is that fair that you think at 55 percent it's an opportunity for a minority candidate to be elected?

A. Yes, it is, but it's not a guarantee. I keep referring to the Senator Bankston district where he's in a majority-minority district and yet won over minorities.

Q. And in your mind, do you believe that 55 percent registered results in a more than 50 percent minority turn out as a result of those districts or would it be less than 50 percent of those that actually vote in the election in your mind?

A. I still do not think that 55 percent registered majority and that's based on my own experience that I mentioned earlier today about actually calculating the returns in St. Landry Parish over many election cycles on that. I don't think that that guarantees it because you [69] have the turn out and the fall off depending on the interest in the election, but generally proportional to the white community in that same division, you'll have still the same proportion or larger to turn out and less of a fall off.

Q. So if we were going to talk about where do you believe is an equal opportunity, not a guarantee but an equal opportunity for minority candidates to be elected, if you start at 55 and then you adjust in your mind for maybe even registration differences, but even beyond that turn out differences and then roll off differences between minority and non-minority, are you in the 40—what range of voters participating in that election, what range would you put it to be an equal opportunity?

A. I would see that in a 55 percent registered or 54 to 56 registered minorities that given my opinion about it that they would be down to about an effective 40 something, around 45 to 48 percent effective voting power versus the white side of those who actually go vote because typically the white community votes in larger numbers and the fall off of various positions on the ballet is much less.

Q. So for those adjustments you're talking about at the election level, at the particular casting of the votes, you're in the 45 to 48 percent?

A. Yes, and the reason I'm doing it is because that's where the action is on election date.

[70] Q. Absolutely.

A. But we didn't want—the 65 percent I think is over doing it, that's what this Court has said.

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[78] Q. Let me ask you this one final question about incumbency. It was mentioned about whether or not Act One took—were you concerned about what is—strike that.

What do you see as the role of incumbency protection in redistricting and so far as it pertains to the State?

A. I think it occurs in Washington, I know it has some place in the Louisiana Legislature that as time goes by and a member of the body is there longer, certain things happen if they have played their congressional or legislative politics properly. One, they have seniority within their party. They're going to advance to the positions of power over time.

I could—even subcommittees in the Congress, I can [79] relate to you the experience with Jimmy Hays very graphically. Some committee, some kind of public works committee, I asked him for 300,000 to 30 something, he put in the Act of Congress about 10 or 12 million dollars then had to compromise it down to only 5.

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[80] Witness: Glenn Koepp

JUDGE WIENER: Thank you very much, Senator. The Court would like to recall Mr. Koepp to the stand.

JUDGE WALTER: Mr. Koepp, let me ask you, considering—you're familiar with—

THE WITNESS: Yes.

JUDGE WALTER: And the three factors that you have the compactness, numerous minority cohesion, block voting, is it possible to draw seven congressional districts, two majority Afro-American districts that are compact that don't travel and meets [81] the Gingles census?

THE WITNESS: Your Honor, I truly believe that this is the most compact—the Fourth District in this plan is the most compact second minority district in the state that has 55 percent registered to vote minority.

JUDGE WALTER: And are you telling me that Afro-American distribution in this state is such that you just cannot draw a compact district?

THE WITNESS: More compact than this one? I don't believe so unless you were to take the issue of compactness being a point in the center and the closeness around it, not considering the total area mass. If that's the definition of compactness then maybe the plan they were just discussing certainly is closer to a central point. But then I think—

JUDGE WALTER: But it's ignoring the traditional—

THE WITNESS: That's what it does. And it more than goes in and gobbles up, if you will, I think the Court's language of minority precincts versus majority precincts.

JUDGE WIENER: In the terms of Gingles the concentration of black majorities, this is the best you can do; is that what I heard you say?

[82] THE WITNESS: And have it—

JUDGE WIENER: Best you can do?

THE WITNESS: The best I believe you can do and have it not violate other standards that doesn't look like.

JUDGE WIENER: What about your testimony yesterday where you said hands off of Shreveport? You found then that you had to put hands on Shreveport?

THE WITNESS: Yes, sir. Your Honor, the thing about that is there's such a major concentration of minorities right here in Caddo Parish, in Shreveport. There's no other spot in the state, even considering Monroe or up the Mississippi River. If you look at it from the terms of is it a high concentration minority, yes, it is, but Tensas Parish, although it's a very high concentration, is only 10,000 people. We're talking about 5,000—if it's 50 percent we're talking about 5,000 blacks, whereas Shreveport alone in one very concentrated area here in town has about 80,000 blacks and there's no other concentration of them like that in the state other than, of course, the Orleans and East Baton Rouge.

JUDGE WIENER: But you get out of Orleans you have 80,000 to make up 55 percent of 603,000?

THE WITNESS: Yes, sir.

[83] JUDGE WIENER: And you cannot avoid going from there to Baton Rouge to get 55 percent of 603,000 is what I hear you say?

THE WITNESS: Okay. Your Honor, maybe I'm misunderstanding. And have it meet those other standards as, of course, I interpret them and I think that we looked at.

Yes, sir, you can create probably—if I may. If you just go in and see if you can make a second district in Louisiana that has 55 percent registered voter minorities and—

JUDGE WALTER: How about 55 percent population?

THE WITNESS: Okay. And have it continuous, we can start in East Baton Rouge and not go any further than Alexandria and stop that district. It would go – East Baton Rouge would go down the Mississippi River, probably St. Charles, St. John and into Lafayette. We could take it, go into the Felicianas and into the top of Tangipahoa, go up the river and stop at Monroe. You could probably cut another one and cut the tail off and go to Alexandria and Monroe but not go as far down the river.

There is a plan that actually does a Y. It comes down the Red River then goes up this other side to [84] Monroe.

JUDGE WIENER: Is one of those more bizarre than what you've got?

THE WITNESS: Yes, sir, that's what I'm saying. There's even one that goes to Lake Charles. But every one of those seems to be much more bizarre, all of them are more biarre, if you will, weird drawings than that. So you can create a lot of versions of a second minority district but none I believe as compact, as nonbizarre.

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Q. Would you consider District Four as it is for Louisiana, would you consider it reasonably compact?

A. Yes.

Q. That's all I have.

JUDGE WALTER: Why is it reasonably compact? I mean it's obviously not compact. Now how is it reasonably compact?

THE WITNESS: Your Honor, my opinion of that, and I think it's even in the decision by the [85] Supreme Court, compactness is in the eye of the beholder. You know it when you see it.

JUDGE WALTER: It's not compact to the eye of this beholder. Why is it reasonably compact?

THE WITNESS: I think that what plays a big part in that is the past history in Louisiana of what congressional districts look like as well as what that –

JUDGE Wiener: Are you talking about old Eighth?

THE WITNESS: Yes, sir, the old Eighth, the old Fifth. Where, you know, the old Fifth had a much smaller turn where it was part of North Louisiana and part of Felicianas than this one does. It was a very thin line that came through. Those districts have been in existence before, so taking that into consideration.

And I guess it also has to do with your own interpretation or decision of what compactness is. And if it's a square – if it's closer to a square or a circle, probably this isn't as compact, but if that's not what you're looking for, if you're looking for the creation of congressional districts I really believe this is. And I think if you look across the country at districts like this you will see congressional districts all over the country.

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[87] JUDGE WALTER: Now you can go back to do whatever you were going to do. This is just as a matter of curiosity, is this a computer program or is it –

THE WITNESS: Your Honor, it's a –

JUDGE WALTER: Is it available on disk?

THE WITNESS: No,sir.

JUDGE WALTER: Transferable?

THE WITNESS: No. The computer that the data – the drive is about 2.5 gigs of information. At this point it takes a very large –

JUDGE WALTER: Can't get it on a lap top?

THE WITNESS: No, sir, you cannot. It's a very large mainframe that we have to interact with on a large workstation. Ten years from now or the next time we do it we're probably going to do it on PC's. But at this time we have to be fairly close to that mainframe. It's not transportable, if you will, across the state.

JUDGE SHAW: Let me ask you something. If you want to move the line from one district, say District Four, if you want to move the line how soon on that computer can you tell me how the percentages of black and white change, how fast?

THE WITNESS: It's instant. What we do is, the way that system works, the state—we use, of [88] course, precincts are the lowest geography you go to. We really can go below precinct down to the census blocks and if there's data at the census block level, both population by race—

JUDGE SHAW: Does it change the other six districts instantly too?

THE WITNESS: Yes, sir. What that computer does, you set that up—you originally set up and you say I have got this geography and the State of Louisiana is 4.2 million people. I'm dividing it by seven. And the computer immediately comes up with what is the ideal district of 603,000 and then you assign District One. You pick the color on the map that you're doing. I think we've got hundreds of variations. You pick a color for District One and then you start assigning—the largest level you can assign at one time is a whole parish. You assign that parish. It instantly tells you District One now has whatever that total is. East Baton Rouge Parish, the same thing. 365,000 people I believe.

Then under that list we carry about 42 items. It's total population, total white, total black, total up. And then the other categories of census which is American Indians, Pacific Islanders, and other people.

And then the second set is by 18 years or older. [89] So it's that same category of 18 or over. And the next set is total registered voters in the state of Louisiana and we picked 1984 I believe in this and we brought that data in. And it shows total white, total black, total up.

JUDGE SHAW: Registered voters?

THE WITNESS: Registered voters; yes, sir.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

NO. CV-92-15222S

RAY HAYS, ET AL, PLAINTIFFS

versus

STATE OF LOUISIANA, ET AL, DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

The above-entitled proceedings were had before Judges Walter, Weiner, and Shaw in the United States District Court for the Western District of Louisiana, Shreveport Division, on the 22nd day of July, 1994. Afternoon Session.

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[26] MR. MONGRUE: Yes; and I think, Your Honor, what you have got to look at is there is no way to draw a district without looking at race. And the other thing is in Whitehead which is the case in Crowson, Justice O'Connor said the State doesn't have to prove itself guilty in acts of remedy. The State doesn't have to say: Okay. Before we draw a second minority district, we think we might be in violation of Section Two. We are not sure. It looks like it fits [J]ingles; but before we draw this second district, someone has to sue us and make us do it. The State doesn't have to affirmatively prove they are guilty of Section Two in order to comply with it. It is just that their reasonable belief that compliance with Section Two, you would have

a problem with compliance if you don't draw that second district. That's all we need. We don't have to confess judgment that we are guilty before we do it. I think that's what Senator Brinkhaus and Bagneris talked about, and Koepp. I am sorry. Simply looks at the district says: Boy, I am really close. I can go to Shreveport, and I have got the district. All right. So, he says it is close. It may be a close call under Section Two; [27] but the thing is that the State doesn't have to say: We are definitely in violation of Section Two before we draw that district because then we are going to have to go litigate. So, the State's in a terrible position if we have to do that.

JUDGE WALTER: If in your first, if those are compelling state interests, then why wasn't Act 42 okay?

MR. MONGRUE: Why wasn't Act 42 okay?

JUDGE WALTER: Yeah.

MR. MONGRUE: The only, my view of Act 42 is the only problem that Act 42 had was bizarreness of shape. I still believe and I know this Court accused me of being disingenuous last time in its opinion, but I still believe that the, if you look at commonalities of interest, they are still there in Act 42. The only thing that I found wrong with Act 42 was its bizarreness. I still believe that, you know, if that's taken out of the picture then Act 42 is—serves the same purpose or then the question compact may be there too. 65 percent, I agree with that. Other than that, I don't think, I think the State's compelling interest is still there. I think that remedy, past discrimination, compliance with Section Two, how [28] many plans were introduced in this section in which they create a second minority district. The fact that they can do it, the fact that Senator Brinkhaus depending on whether it is on your baby or if your ox is getting gored, the district looks nicer or it doesn't look nice. So, how is a legislature sitting there in Baton Rouge going to make this call? I think the test is whether or not they are being reasonable or not, not whether they are absolutely exactly in line. Because if you do that, you put us in a predicament. Representing the State in this matter, we have got U.S. Justice Department which we have to meet their requirements of. This Court issued—

JUDGE WALTER: You have to?

MR. MONGRUE: We have to get it precleared.

JUDGE WALTER: Or—

MR. MONGRUE: Or go to D.C. District Court, Your Honor; and I agree that's an alternative. But you realize D.C. District Court, the test that we have to satisfy is not only the plan does not result in discrimination, it has no—we have got to meet—the burden in that court is a lot greater than any other court. If you read what that says, the State [29] has to file a suit, plaintiff in the case, and meet the burden that we have neither the intent nor the result of diluting minority voting strategy or in any way impairing minority voting strategy. That's the burden that opposite side has. So, we're damned if we do; damned if we don't. If we draw two, this Court says that's not good enough. If we draw one, the D.C. District Court says: Well, maybe you shouldn't. The state is in a—I guess, I don't know how else to say this. We have got the U.S. Justice Department and the Federal Court in D.C. District Court telling us essentially we are going to go one, you need two.

JUDGE WALTER: We don't—

MR. MONGRUE: We don't have any in D.C. District Court, but we have got a significant burden to overcome if we do that.

JUDGE WIENER: There's a little footnote in page one about that.

MR. MONGRUE: Yes, you did, Your Honor; and it was, I guess, of little sol[a]ce to us who have to do—I mean, we are sitting here between the U.S. Judicial Branch and U.S. Department of Justice. One is saying: You have got to go this way. One is saying: You have got to go this way.

[30] JUDGE WALTER: Did they say that?

MR. MONGRUE: Did who say what?

JUDGE WALTER: Did the Justice Department say you have to go this way?

MR. MONGRUE: The plaintiffs have introduced that letter sent by the Justice Department.

JUDGE WALTER: Sent to—

MR. MONGRUE: It was not sent to the State but it was something that was brought up that the Justice Department still believed we had to have two—

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[51] JUDGE WEINER: The Court has deliberated on the motions, plaintiffs for a judgment in the matter of law; and the motion is granted. Act One of Special Session Two of 1994 is unconstitutional. The plan thereunder is null and void. The elections under that plan shall be enjoined. Again, however, we do not invalidate the 1992 elections that's proceeded. The map and the plan clearly reflect racial gerrymandering. That shifted the burden to the State to show narrow tailoring to further a compelling governmental interest which in itself has failed to do under among others Shaw v. Reno and Thornburg versus [J]ingles. The credible evidence old and new demonstrate solely that Act One is less extreme than Act 42 but nonetheless race driven. The Court considering the impending congressional elections shall expedite the appointment of a special master and provide a plan for the election.

The Court reserves the right and shall in all liklihood issue a written opinion as well as a separate order as the scope and arguments given.

The case is concluded. Court is adjourned. The Court would like to see in conference Mr. Jerome, Mongrue, and Hurd.

[52] MR. MONGRUE: Before we adjourn, could we make our motion under Rule 62 for the State pending appeal? I would like to get that motion.

JUDGE WEINER: We accept the motion. Take it under advisement.

JUDGE WALTER: We will see you all right through here.

(Whereupon, the testimony was concluded and the witnesses excused.)

HOUSE & GOVERNMENTAL AFFAIRS COMMITTEE

April 18, 1994

Committee Room 3
CHAIRED BY REPRESENTATIVE ACCARDO

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[7] SENATOR GUIDRY:

Senator John Guidry, District 14, here in East Baton Rouge Parish. I simply wanted to comment, I speak in support of House Bill Number 8 and the maintenance of two minority districts here in the State of Louisiana.

I think the plan that is going to be before you today will meet the criteria that the Court has set as relates to those issues, contiguity in terms of compactness and commonality of interest. And, more importantly, it will allow the persons of that district of African-American descent to have elected a person of their race.

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[28] REPRESENTATIVE STINE:

Mr. Chairman, I'd like to ask a question of not only Mr. Copelin, but it's a standard question I'd like to have everybody answer on whatever maps they bring up.

I know that we want to have a plan that is honored by the courts, and when reading the plan document or I guess the Court's interpretation of why the current plan was thrown out, they always talk about what was the driving force or why you [29] drew the district lines the way you did, and, of course, they talk about race, they talk about regionalism, they talk about whatever the driving force.

And so a question I'd like to have Mr. Copelin and anybody else who comes up here with a certain plan is to answer the question of what the driving force or why they drew the lines the way they did.

THE CHAIRMAN:

What's the political reason for the way those congressional districts have been drawn?

REPRESENTATIVE STINE:

That's correct.

THE CHAIRMAN:

And whether or not it's driven by economics, by race, by religion, by region, by economics, or whatever? That's the question you want to know?

REPRESENTATIVE STINE:

Yes.

THE CHAIRMAN:

Mr. Copelin, do you care to answer that, sir?

REPRESENTATIVE COPELIN:

I'll attempt to do that, Mr. Chairman. Basically, the Staff was requested to come up with [30] a plan that obviously had commonality, one that was driven by compliance with the recent court order, and one that, again, reflected the spirit and intent of the Voting Rights Act, and that was to have at least two majority black districts.

I'm advised that the statistics and facts reflect that. I would have to yield to the more specific details on the staffers who did the plan.

REPRESENTATIVE STINE:

In setting up the 4th district, would you say the driving force was regionalism, race, religion?

REPRESENTATIVE COPELIN:

Well, I wouldn't want to highlight either one of those. Again, I think there are a lot of factors that go on the commonality, Mr. Stine, but the driving force was both to make sure we comply with the recent court decision and also the spirit of the Voting Rights Act.

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[36] REPRESENTATIVE BRUNEAU:

Mr. Copelin, you talked about the spirit of the Voting Rights Act, whereas the Court in the Hays decision talked about what the Voting Rights Act actually said. And I went back and I reread that decision last night, and I don't find anything in that decision—maybe it's the Justice Department or someone in the Justice Department that says that the districts must be race driven totally and that there must be two black districts.

Now, from a political standpoint I can certainly see that there can be an argument over whether there should be one or whether there should be two, or one of the bills has no black districts and I think that's what I call a reverse wedge, which is a racial gerrymandering one way as distinguished from a racial gerrymandering in the [37] other way, and as I read the decision, it says that you can't racially gerrymander.

And I know we're going through a thicket of legalisms because it seems to me it is obvious that some nameless, faceless bureaucrat in the Justice Department who supposedly told you when the last reapportionment was going down that unless there were two black districts the Justice Department would disapprove the districts, obviously was overruled in the Court decision.

And I would simply like to know whether it is a political decision that you feel we should have two districts that have majority black in them and that we should do whatever we need to do in drawing the lines to achieve that, or whether it was someone in the Justice Department who told you that. And if it was someone who told you that, would you please tell us who it was?

REPRESENTATIVE COPELIN:

Mr. Bruneau, I think the fact that the Justice Department rejected the plan for the vote of Elementary and

Secondary Education I think it was, and, in fact, sent it back and said we ought to have two districts shows where Justice was at the time. I understand there's a different [38] Justice Department now.

And no, it is not completely political, it's not political motivation to have two majority black districts. That, I must admit for the record, would be my political preference, but I don't think it's driven by that at all; to the contrary. And, again, when we send this plan to Justice, and we must do that, we'll find out.

I hate to repeat, but the plan was developed basically—and I agree with you there is some difference of opinion with the courts and the Justice Department, and the intent of the drafting of the plan was to comply with both and at the same time be reflective and fair of the political makeup of the state.

REPRESENTATIVE BRUNEAU:

Okay. Now, let's get back to my specific question on that issue. Did someone in the Justice Department tell you that there must be two black congressional districts in order to gain approval?

REPRESENTATIVE COPELIN:

I have not personally communicated with anyone in Justice, and if I did I would think that Justice can come here and speak for themselves. [39] I'm not going to purport to represent Justice's position at this time.

REPRESENTATIVE BRUNEAU:

Okay. That's question number one.

Now, as I read that decision we had some it was Justice Weiner I think that wrote the majority opinion?

THE CHAIRMAN:

Yeah.

REPRESENTATIVE BRUNEAU:

We talked about compactness and contiguity. Well, contiguity, of course, means that all the parts need to connect either by land or by water. And I think one of the points was that more so in the North Carolina case than in the Zorro plan,

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[43] REPRESENTATIVE BRUNEAU:

All right. Point well taken. You say there's a commonality of income. What other commonalities are there?

REPRESENTATIVE COPELIN:

Well, I think we have—it's a big issue in the public eyes now, has to do with health care and criteria around that.

REPRESENTATIVE BRUNEAU:

Wait. Wait. On a particular bill before a Congress at a particular time, that's why we [44] should have a congressional district for ten years because there may be people who think that some health care bill—and even Slick Willie changes his bill from day to day, so I don't know how anybody could know what they were for.

REPRESENTATIVE COPELIN:

I thought your question was the common interest of the citizens—

REPRESENTATIVE BRUNEAU:

Common interest, yeah.

REPRESENTATIVE COPELIN:

—and I'm saying if you look at the census tract, and they identify certain issues that Congress speaks to, and I think if you took that test you'd see some common interest. I won't get into debate as to what I think is a common interest and what other members of the Committee or the legislature might think is common interest as I said earlier because we're going to have various definitions.

REPRESENTATIVE BRUNEAU:

So we've identified the Health Care Bill and income as points of commonality. Is there anything else that—

REPRESENTATIVE COPELIN:

[45] There are many others points and I'll be glad to get them to you.

REPRESENTATIVE BRUNEAU:

If you would, please.

REPRESENTATIVE COPELIN:

No. I'm not going to take that test right now.

REPRESENTATIVE BRUNEAU:

In other words, you don't choose to put on the record how you feel this wedge is in comformity with the decision of the Court?

REPRESENTATIVE COPELIN:

I'll be more than happy to, and I'm sure that all the lawyers involved, Mr. Bruneau, as Mr. Deville has already stated they're lining up to file suit, I think everything is going to be in the record before all this is said and done, and that's the appropriate place to put it in the record.

REPRESENTATIVE BRUNEAU:

So you don't think it's appropriate to say in this Committee what the points of commonality are other than income and the fact that you feel the majority of the people are for the President's Health Care Bill?

[46] REPRESENTATIVE COPELIN:

No, that is not correct. That's your words, Mr. Bruneau.

REPRESENTATIVE BRUNEAU:

Then, please give me the other areas. I'm searching for them.

REPRESENTATIVE COPELIN:

What I'm saying, Mr. Bruneau, is that I will be more than happen to supply to you and the Committee a formal response as to what all the various common interests are. I'm hesitant to do at this point because whatever I say you're going to say it's not a common interest on the part.

But let me say, this is basically the same district that Gillis Long had for years and nobody seemed to have any problems with the common interests of the citizens at that time. I mean, it's one that has worked historically.

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[50] REPRESENTATIVE LANCASTER:

Mr. Chairman, I'm not going to be long. I just want to make a couple comments.

You remember when we did this the last time and I pointed out to you that sooner or later the Justice Department was going to meet the courts? [51] I think that day has happened. And the Justice Department, I believe, and I don't know what they are going to do because we haven't had enough time to really get into it, but I think the Supreme Court is going to give them a new criteria because it's my understanding the Supreme Court has authority over the Justice Department. So were really dealing with the Supreme Court right now and we're going to have to do what they say rather than what the Justice Department says because we did what the Justice Department said last time.

As a matter of fact, the testimony given this Committee was that we had to draw two minority districts or the Justice Department would not approve it. I think the man sitting next to you

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[55] REPRESENTATIVE REILLY

I look at this plan, and other than that major problem, I don't see it being that unartful. I think Mr. Copelin appropriately reflected on the old Gillis Long district. I have a copy of the 1980 reapportionment plan, and if it was projected on the screen and had colored districts, it would look every bit as artful or unartful as that one up there.

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[58] REPRESENTATIVE BRUNEAU:

Well, I can always go back and sing again, but I was just going to go ahead and sing through and I'll be very brief, Mr. Chairman.

I think all you need to do is look at the map and you can see that it was done solely on that criteria. It is not compact, and so far as commonalities of local interest, what local interest can Shreveport and Baton Rouge have together? It just boggles the mind that we can [59] sit in here and look at each other with straight faces and say that. I hope that whoever looks at this record, if somebody ever does, looks at the maps as well in doing it.

It just, once again, runs rough shot over the traditional political geography of this state because it starts off in mind with a premise that we must do this. And the bottom line is that the black population in this state is spread out to the point that you cannot have two black districts that fall naturally. One certainly falls naturally in most of Orleans and part of Jefferson Parish, but if you're going to make two then you have to create some type of unnatural being like this wedge.

And, again, the wedge is certainly not as bad as Zorro, but in reading the Court decision, I don't see how either one of them passed, but that's what courts are for. And, of course, if the other plan was so good, we heard how great the Zorro plan was, what happened to the proponents of the Zorro plan who said that it would meet all the tests? Why don't they just go to the Supreme Court with the Zorro plan if it's so good and see what Supreme Court says about that type of [60] reapportionment.

I think we ought to solve the question once and for all instead of going through 5th Circuit, let's go to the Supreme Court and see what they have to say.

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[71] REPRESENTATIVE COPELIN:

Thank you, Mr. Chairman.

First, let me say for the record, Mr. Bruneau, that I plan on sitting throughout the entire hearing because I'm interested to hear in detail the other proposals. I have some questions [72] I'd like to ask on them.

Secondly, I'd like to urge the Committee to vote favorably to send this measure to the floor. This bill does, in my opinion, comply both with the spirit of the Voting Rights Act and the recent court ruling that came down.

It runs from Shreveport to Alexandria and it goes along portions of the Red River, and I think that's a commonality. There are farming communities that I think also are common, and it's linked by a major transportation system, namely I-49 and portions of I-10. I think that's common.

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[107] REPRESENTATIVE BRUNEAU:

I'm trying to look at the map and figure out why it was necessary to do those things between the 3rd and the 7th district.

REPRESENTATIVE FLOURNOY:

It was absolutely necessary to get a minority district. I make no bones about it. The intent of this plan was to have two North Louisiana districts and two minority districts. I'm not going to wiffle-waffle with you on commonality interest. Specifically, that was the intent of why this plan was drawn because in my opinion the basic perception of the legislature is an interest in having two minority districts; a basic interest of North Louisiana is having adequate representation. This plan accomplishes both of those objectives.

TRANSCRIBED MINUTES FROM THE SENATE AND GOVERNMENTAL AFFAIRS COMMITTEE HEARING ON APRIL 18, 1994 FOR LOUISIANA'S CONGRESSIONAL REAPPORTIONMENT

LOUISIANA ATTORNEY GENERAL EXHIBIT H-5 ACT 1 (1994)

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[9] BY MR. KOEPP:

Mr. Chairman and members of the committee, once again we're here to do redistricting for Congressional Districts and I guess a little brief [10] history, the reason we're here today is that after the redistricting rounds in 1991 were completed and the present Congressional District plan was passed, adopted, approved by Justice and implemented and seven Congressmen were elected, a suit was filed, actually prior to the election a suit was filed, but a three judge panel in Shreveport allowed the elections to go forward but maintained the case pending an outcome of a case in North Carolina in the Reno, the *Shaw v. Reno* case in North Carolina. In that case the Supreme Court set some guidelines down and held that plaintiffs in North Carolina had a right to bring an action on uh racial gerrymandering and that they had a claim under equal protection clause and sent it back to that court with uh, with District Court, the three judge panel in North Carolina, to try the case. That case has only been tried in the last month in North Carolina. The Louisiana case then picked back up and was tried here in [11] Louisiana under the guidelines as set forth by the Supreme Court case. The three judge panel, as all of you know, found the present

Congressional Districts in Louisiana unconstitutional and provided that, although they specifically said that they, the seven members of Congressmen that were elected by those districts shall remain in office for the duration of their term, which will expire next January, they made it very clear that those districts are unconstitutional and no other election can be conducted on them. In the mean time, as far as, or with regard to Federal Court intervention in State or Legislative redistricting and Congressional redistricting, the Federal Court, basically, finds fault and it leaves it back to the State, whatever that State organization is that has the authority to redistrict, to attempt to perfect a remedy under their decision. That is really where we are here today. Although we've appealed to the U.S. [12] Supreme Court the finding of fault in this case, it hasn't come up yet, the remedy stage is still to be tried and the U.S. Supreme Court has been very clear in other cases directing the District Courts that the Legislature should be given the opportunity to provide a remedy. And that's what we're here to do today to attempt to provide a remedy and that is to redistrict the State of Louisiana into seven Congressional Districts. It is the Legislature's responsibility to do so, the only difference now being that once the Legislature, assuming that there is an act passed that the Governor signs, it still has to be presented to the Justice Department under Section 5, Preclearance. After it is precleared, the Court, the three judge panel, still gets a shot at it, to take a look at it to see if, in fact, the Legislature, and whatever they done, has met the requirements that the Court set down in that case. The screen that is being [13] shown right now on the wall, of course, is Act 42, which the Court found unconstitutional, and the main discussion in that case is on the blue district, District Number Four, where they found that that district was in itself racial gerrymandering and based most of the decision of the case on that. Once that was done and uh the Legislature, or I should say the Senate, because I work for the Senate, and uh we started, the staff started working to attempt to put together some sort of plan or program that would meet the requirements that the Legislature has to do and uh could, in fact, meet Court requirements. Senator Nunez specifically asked me to work on producing a plan that if there was any way we could do it that would disrupt the least number of people in the State that would, in fact, not be geared to disrupt Republicans, or incumbent Republicans, or Democrats, or incumbent Democrats, as well as if there was a way [14] to maintain what we had obtained in the past, to do that. The result of that, as you know, I spent a lot of time working on it, there was a proposal that has now been, of course some modification was done to, but the proposal is presented as Senate Bill Number One, which I believe does what Senator Nunez and, of course, you Senator Bagneris and uh Brinkhaus, and others of you have asked me to do, and attempted to do that. In doing it uh I looked at a lot of past history in attempts to determine what we had done in the State of Louisiana in the past, remembering that in 1980 we had eight Congressmen and in '90 we lost one. And the State, in '80, was divided into eight Congressional Districts. It was done so in the '60's and the '70's. Uh, when, with losing a Congressman made quite a different burden own us to reshuffle the State. Each area, each old Congressional District, had they stayed the same would have still had to [15] increase in population by some seventy-five thousand people, and although when you're in a major metropolitan area seventy-five thousand people is not a large area. When you're in the rural parts of the State, you're talking about a number of parishes. We've got several parishes with fifteen and eighteen and twenty thousand, even two with under ten thousand in them, and when you try to build a district to increase by seventy-five thousand, you're covering a lot of area. One of the things that I also looked at, which we do and have done in the past, is regionalization, and what can we do in regions. If you will take a line across Louisiana in what I understand is considered Central and North Louisiana, it will include a line that includes Beauregard, Allen, Rapides uh, LaSalle, Concordia and Catahoula Parishes, and if you take those parishes North and look at the population uh, Sue, do you have that population count?

[16] BY MS. GUIDRY:

For what?

BY MR. KOEPP:

The North and the South stuff. Anyway, if you look at that population count in that area up there, in 1980, it was about twenty-seven percent of the population in Louisiana and it was more than enough to provide for two Congressional Districts. If you look at the Acadiana area,which is an area by Legislative Resolution back in the '70's it was designated as what was Acadiana, it was all the parishes in the Acadiana region. Those areas had enough population, they actually had about twenty-nine percent of the population of the State, more than sufficient enough to have two Congressional Districts. The 1990 population in Louisiana only increased by twenty-five thousand. It was much less than the national average. The result was that we lost a Congressman to some other state that grew more than we did. But at the same [17] time there was some loss of population North, in that North and Central region of Louisiana, the growth that occurred actually made up for that loss as well as increasing, most of which was in the metropolitan area of New Orleans and the Florida

Parishes. Right now if you take that total population and divide it in half you've got, you're about thirty thousand people short in those Central and North parishes of having enough population for two full Congressional Districts. If you look at the Acadiana region, and again it's everything below the uh, it's everything below the, what I call the Central/North Louisiana region, and virtually everything that is West of the Mississippi River is called Acadiana. That area actually had enough population for two Congressional Districts and some thirty to forty thousand more. So if you take those two areas and combine them together you do have enough population for four Congressional Districts, but the North [18] region would have to come down. And that's just a uh, the same situation occurs in the Orleans metropolitan area, there is sufficient population in that area for two, and in the Florida parishes for one, which makes up your seven Congressional Districts. When I was looking at all this information in attempting to uh, under the request that I got from the Senate leadership uh to put this together, I looked at some old historical Congressional Districts. One of the things that I found real interesting in the Court case is the Court talked about the fact that the Fourth District went, and it described from land area and land type to persons types to religion and uh socioeconomic backgrounds, I believe. One of the most interesting things that I discovered when I was looking at this background information was the old Eighth District, and I do not have the map down right now to put up on the wall, I wish I did, but the old Eighth District as we remember [19] in 1970 went up the middle of the State.

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[20] BY MR. KOEPP:

But the thing that I wanted to, I guess, make, and we'll get all that when the map comes down, but that district split parishes, as a matter of fact the Eighth District went to Natchitoches Parish, but it didn't take the whole of Natchitoches Parish, it split Natchitoches, it also split Winn Parishes. Also it took all of Sabine, was in the old Eighth, and that Eighth District went all the way from Sabine and Natchitoches Parish all the way to St. John Parish. It included people from different racial and ethnic and religious backgrounds. It included both red dirt and the soil of the Mississippi Delta bottom. So those things we've done historically. Another very interesting thing, if you will look at that map, the Fifth district in those days included the Monroe area and it went all the way to Lincoln Parish, and it took real whole parishes up there and then it came down through Concordia, [21] Catahoula and then around the corner into West Feliciana, East Feliciana, St. Helena and a small portion of Tangipahoa Parish. Uh, that plan was in 19, like I say, 1965, or so, and when we bring up the plan that I put together you will see a very close similarity between what was in the old Fifth District, twenty, thirty years ago and the way we've created the new Sixth District under this particular plan. One of the things I think the committee, and it is my opinion, that the committee should consider with regard to the Court decision, what the Court decision did was held what you did in creating redistricting in '91 was unconstitutional. You're here today to create a new plan, hopefully that is constitutional, and meets all other applicable statutes. So, to attempt to perfect a plan under the specific comments and guidelines established by the Federal Court where they were simply talking about what we had done in the [22] Fourth District, I don't think is really possible, and I think you need to take into account and consideration uh your obligation and duty simply to consider legislation that creates new Congressional Districts that meet what we believe and what you believe actually are the guidelines. Uh, if you are

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[41] BY SENATOR NUNEZ:

What does it do to the Third District?

BY MR. KOEPP:

The Third District becomes all of Jefferson Parish, Jefferson still gets cut three ways, there's a small cut into the Second District in Gretna. There is also the Sixth District, which is in green, comes into Jefferson Parish right out by the Airport, if you will. The rest of Jefferson is left in it and then all of—

BY SENATOR BRINKHAUS:

Terrebone and St. Mary.

BY MR. KOEPP:

Terrebone and St. Mary, yes, sir.

BY SENATOR BRINKHAUS:

No, Terrebone and Lafourche.

BY MR. KOEPP:

Yeah, Terrebone and Lafourche, I'm sorry.

BY SENATOR NUNEZ:

So Jefferson becomes a part of the—

BY MR. KOEPP:

It becomes, yes, sir, it becomes, yeah, [42] it's predominant and I think uh if you'll look in it in the Third District in that particular plan Jefferson Parish has four hundred and nineteen thousand people in it out of the six hundred.

BY SENATOR NUNEZ:

Tauzin's out of a job.

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[47] BY MR. KOEPP:

—as far as the Congressional District that is in it, embedded in it. This is [48] one of the things that I talked about earlier, and just to let you take a better look at what the State looked like the way it was redistricted in 1965, that's what the Congressional Districts looked like, and you can see uh, understand that there are two districts in green, one that starts in St. John. That particular district it splits Ascension uh, it goes up the river and it splits Natchitoches and uh, and Winn Parishes. Now, understand that these are, these are close estimates because we no longer know exactly the boundaries of the old wards and, that occurred, that were there then but we're real close. But notice the Fifth District, the similarity of where it turns the corner and goes into the uh, the Felicianas and across and takes a portion of Tangipahoa Parish, so that's, that type of drawing that I put together is very similar to what we have done in the past. We have a history of doing these type districts, it's not something [49] that we uh, so I would say that when you talk about traditional uh past guidelines of redistricting you have to consider all this, and that's the way we did it thirty something years ago. There's a lot of similarities between that and the way the particular bill that I prepared for you, Senator Brinkhaus, does, makes that draw. Understand this is eight districts, we went from eight to seven, so it does make some other changes.

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[55] [BY SENATOR BRINKHAUS:]

population. Additionaly, Senator Rayburn asked that we continue the Gillis Long district which you will see is the, now the Fourth District, which was the old Eighth, which at that time, prior to reapportionment was about a forty percent black district, enhance is it as much as possible while keeping parishes whole, which resulted in a 55.99 percent black district reaching up from uh Caddo down to uh the East Baton Rouge Parish area. The Seventh District is kept pretty much intact except it had to drive further North to pick up the additional people that were necessary [56] for it to be whole under the fact that we went from eight Congressmen to seven. The Third District is the same way keeping it, again, as many whole parishes as possible and community of interest. If you'll look you can see there are two Acadiana districts here, the two North Louisiana districts, I'll call it, are, in effect they have three up in North Louisiana but the Sixth District, the Florida parish district, historically is a Protestant, rural district that votes very similar to the voting that you see in the new Sixth that would be up in the Northeast part of the State, they have a great deal of similarities. The old Eighth District that has now been expanded up, again tries to keep a high influenced black district while at the same time holding together the traditional district that ran the Red River and the Mississippi River under Gillis Long, this keeps this all together. The Third District keeps all of the coastal and Acadiana region [57] together, the same thing with the Seventh. The First District takes in the bedroom communities, the Second creates the black district in the Orleans area that has been there for the last several years.

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[61] BY SENATOR THOMPSON:

What area, is that the Shreveport proper area there?

BY MR. BAER:

Yes, sir, that's Shreveport itself, it picks up the communities of interest out of Shreveport along the river that uh, with the rest of the river parishes, Red River, Natchitoches, the Rapides, Evangeline, St. Landry, Pointe Coupee, Iberville run, right down the river.

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[68] BY SENATOR BAJOIE:

Good morning. Uh, I'm Senator Diana E. Bajoie from New Orleans representing Senate District Number Five. I am here this morning representing the Louisiana Legislative Black Caucus as the elected Chair of the Caucus. The Louisiana Legislative Black Caucus by a majority vote of the Caucus do hereby support [69] House Bill Eight and Senate Bill Three which embraces the official position of this Caucus. The continuance of two majority black Congressional Districts. The Legislative Black Caucus believes that the District Court decision does not alter the necessity for Louisiana's Congressional redistricting plan to comply with the Voting Rights Act, and that such compliance requires the creation of two majority districts in which African-Americans will have the opportunity to elect candidates of there choice to office. Indeed in the brief that the Justice Department filed in *Hayes*, the department argued that Louisiana had a compelling State interest in drawing two majority African-American Congressional Districts in order to comply with Section Two and Five of the Voting Rights Act,; particularly in light of the Justice Department's Section Five, objections to the 1991 redistricting plan for the [70] Board of Elementary and Secondary Education, which created only one majority African-American district. No African-American was elected to Congress from Louisiana in this century until 1990, after the first majority African-American districts were created. Under these circumstances we believe that any remedial plan must contain two majority African-American districts for African-Americans to elect candidates of their choice to Congress. We believe that substantially more than a majority African-American voting age population is necessary for that purpose. In our view nothing in the Federal Court's opinion eliminates the need to create two such districts in order for the Louisiana plan to be in compliance with the Voting Rights Act. Therefore, the Louisiana Legislative Black Caucus stands strongly on it's position that in order for African-Americans in Louisiana to elect Congressional members of their [71] choice, should retain two majority African-American districts with a majority voting age population and nothing less is acceptable. I will enter this into the official record. I'll provide with you a copy of our statement.

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BY SENATOR GUIDRY:

Mr. Chairman, and members of the committee, I come to speak in favor of Senate Bill Number Three by Mr. Bagneris, and certainly I believe that the bill will meet all of the [72] requirements of the recent decisions, both the North Carolina decision and the *Hayes* decision, I think as relates to the number of parishes included in the district and the number of parishes that are split I think this plan does a good job so that those uh, particularly that the Court dealt with in terms of making sure that the districts were contiguous, to make sure that they were compact and that these common interests were served. I think those things will take place in this particular plan. But more importantly I think that the Voting Rights Act and the Constitution requires that each individual have an opportunity to participate in the electoral process and have the opportunity to elect a person of their choice, and uh in this particular case the African-American community of the State of Louisiana, if we follow those principles as are articulated in the Constitution and in the Supreme Court's uh litany of cases, I think that the creation, the [73] maintenance of two majority districts is what this Legislative Body ought to do, so I urge the members of the committee to adopt that particular plan that's before you. Thank you.

BY SENATOR BRINKHAUS:

Senator Guidry, isn't it correct that uh the difference between Senate Bill One and Senate Bill Three is essentially Sabine Parish is in the Seventh District in Senate Bill Three and there's a larger presence of the Fourth District in Lafayette and St. Martin, and those are basically the only two differences in the bills.

BY SENATOR GUIDRY:

Right. And the only other difference, I think there is a particular parish in uh, a particular precinct in the Opelousas area that would be added in Senate Bill Three, Mr. Bagneris' plan, but you're correct, the basic difference is the issues of Sabine and the additional individuals in the Lafayette, and of course, St. Martin was added as I [74] understand it, but those are the basic differences. The only other difference, and I think it's a pretty important district is that the percentage is raised on the Bagneris plan, it's raised from fifty-five percent in Senate Bill One to 56.1 percent in Senate Bill Three by Mr. Bagneris, and I think that's pretty important too in terms of the voting, the registered votes that are African-American, and certainly to the extent if nominally to 56.1 I think that will be important to assure the maintenance and the viability of two seats that are, could be represented by African-Americans. Thank you, Mr. Chairman.

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[76] BY SENATOR GREENE:

I think it's Five. I just want to give a little overview. Basically, we have two different categories of plans, one that creates a second minority district, one that uh, some that don't. Uh, what we want to do, and we get confusing input, I guess, we say we dont' have enough direction from Justice Department, they dont' give us anything in writng, they just give us some suggestions and it's secondhand. Also,

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[108]BY SENATOR NUNEZ:

If old, if Mr. Earl was still alive, Reverend, he would add the Louisiana Senate as one of those friends. We have always taken the moral high ground as you've probably recognized in your remarks, both you and Reverend Jemison. And even in this case from the '70's and the '80's and the '90's, we have strived to, always strived to give equal representation, meet the "one man, one vote" rule, meet the Justice Department guidelines, meet the Civil Rights Voting Act of 1965, and last year when we created the two black districts we were doing the same thing, but we did it in the Senate in the '70's and the '80's. Our directions, of Senator Bagneris and [109] Senator Brinkhaus and mine, to the staff was develop, number one, a district that has representations for two minorities. Number two, to meet the Federal, the Supreme Court guidelines. Number three, to meet the Justice Department guidelines. And number four, to be fair and equitable with the other Congressional Districts in keeping them whole. And I think that's what came out of the directions that we had given Mr. Koepp and Mr. Baer and their staffs. So

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[154] BY MR. UNGLESBY:

– I don't, I would not, in fairness okay, while I'm a lawyer and I'm supposed to know all of this, gentlemen, I'm not gonna suggest to you that I know the details of the process. Right now there's a judgment in effect, and that judgment's what brings the committee here and that's what brings this special session. If no one complains at the conclusion of the redistricting and the bill is passed, signed and filed and goes into effect and there is nobody

[155] who's suing and complaining about it that's the law. So we would like to accomplish two goals here, one, get this redistricting done in an efficient and effective way that protects all the rights of all the citizens and, two, if possible, likewise, avoid a lawsuit. Now, two may not be possible, but you're the only folks right now that are the named plaintiffs, you know. You're the ones that right now have the authority to go back and relitigate whatever we accomplish in the Senate and in the House and the Governor signs. So I was asking you, you've heard the nine proposals by the various individuals, you sat in court and listened to all of this, and according to the record, have actually employed Mr. Weber, who was accepted by the Court as an expert in the Voting Rights Act and in the redistricting litigation, of all the plans that the various people have proposed, do you have any that you feel fall within the criteria that, being [156] acceptable to Mr. Weber and to yourselves?

BY MR. STOKLEY:

Well, we really haven't had a chance to examine them and scrutinize them yet. I mean, we've looked and heard some, but no more so than if a client came in and said to you, well, here's basically this, you would go investigate them more thoroughly before you, besides I can't, I don't think we should be the ones telling the committee which plans to vote for, that's their process.

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[169] BY SENATOR BRINKHAUS:

Well, I'm uh, excuse me, gentlemen, I'm looking at page forty-seven of the opinion and that's where Dr. Weber says that, according to the Judges now, I'm presuming the, interpreting what he said properly, "the Plaintiffs' expert witness at both the trial and the Evidentiary Hearing testitifed that a plan could be devised that would include a second black majority district, yet still be significantly more compact and comport much more closely with other traditional redistricting principles". I was looking for the part where Dr., is it Lichtman, he appears on page thirty-two, but where he says that he could sit down, but I don't see that [170] that's the place.

BY SENATOR BAGNERIS:

It's just before it's on forty-six.

BY SENATOR BRINKHAUS:

Oh, on forty-six, the page before, where he says uh, okay, "Alan Lichtman", on page forty-six, "one of the Defendants' expert witnesses at the Evidentiary Hearing likewise testified that, were he to sit down with Dr. Weber (the expert on the other side) they could create a [second black majority] district that looked better than this one", and then that, what I had read earlier about Dr. Weber was that he could devise one "significantly more compact and comport much more closely with other traditional redistricting principles". So I don't think this is a mystery being hidden from anybody, it was in the trial.

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[176] BY MR. UNGLESBY:

Okay. Well, in the chance that you have had to see the multiple proposals, okay, and I think it's nine, actually eight different maps, nine different concepts, eight different maps, is there any of those that you feel either closely approaches what uh, either is acceptable to you or to Dr. Weber or is substantially divergent, completely divergent, and you can tell right away from what is acceptable to you or [177] proposed by Dr. Weber?

BY MR. STOKLEY:

All I can say, Mr. Unglesby, is that I have not looked at those detailed enough to answer that question honestly.

BY MR. UNGLESBY:

All right. Now, we got a letter from your attorney, actually written to General Ieyoub asking that, and putting the Senate on notice of an impending potential subpoena, and asking that uh quite a number on internal documents be maintained, do either of you gentlemen know anything about that? I started off asking you that because if you don't know anything about it there's no sense in me asking you any questions. You're familiar with that, Doctor?

BY MR. STOKLEY:

Yes, sir.

BY MR. UNGLESBY:

Okay. Can you tell us what was the point, purpose of that letter.

BY MR. STOKLEY:

I imagine to preserve all information [178] that might be had on drawing districts and so forth.

BY MR. UNGLESBY:

All right. The reason I ask you that is, is it because it is your plan, or that of your attorney with your assent, to file a lawsuit regardless of what comes out of this redistricting?

BY MR. STOKLEY:

No, that's not our intent. I'd like to see the State of Louisiana's Legislature pass a redistricting plan that fits the criteria that was asked for and outlined by the Court.

BY MR. UNGLESBY:

All right. Is it or not your position that a second minority district will violate the criteria set out by the Court, or do you have a position?

BY MR. STOKLEY:

I don't, I mean, if it meets the criteria by the Court then it would be acceptable, certainly.

BY MR. UNGLESBY:

Okay, all right. So the creation of a [179] second minority district in and of itself does not result in litigation from your, from your point of view?

BY MR. HAYS:

Oh, good Heavens, no.

BY MR. STOKLEY:

No, Heavens no.

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[203] BY SENATOR BRINKHAUS:

Okay. Let me ask this, did ya'll have any input into any of the plans that are before the Senate Committee now?

BY MR. HAYS:

Yeah.

BY SENATOR BRINKHAUS:

Which one, or ones, was that?

BY SENATOR CHABERT:

I thought that was the original question when we first started, that was what we were trying to find out, if ya'll had [204] input in any of these plans.

BY SENATOR THOMPSON:

Sure they did, and I called Glenn Koepp and told him that they were gonna have input into it and he just can't take it uh—

BY MR. HAYS:

We were down with Glenn—

BY MR. KOEPP:

It's your Senate Bill.

BY SENATOR THOMPSON:

Yeah, my Senate Bill, that's what it is, and uh, and uh—

BY MR. HAYS:

We were down with Glenn last week working with him.

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[207] BY MR. KOEPP:

—but the plan as, as the plan that is being prepared, that is being uh, that was put forward is the one, it's got a consensus of Congressmen, they had nothing to do with the, with the drafting of that plan, the putting of that plan together, I did that late at night by myself at the request of several members of this Legislature, three of which are sitting up here, Senator Bagneris, Senator Brinkhaus and Senator Greene, who was actually working with me when we actually hit the, –

BY SENATOR THOMPSON:

Sure, I understand.

BY MR. KOEPP:

– that particular configuration. Uh, [208] it was done, as I testified earlier, in an attempt to disrupt the least number of uh districts, if you will, to try to meet the Court requirements of compact, contiguous districts as best we could. Certainly, considering incumbency, which I did, so, no, they didn't, they saw that after the fact. They didn't see that plan until it was, it had been there for at least a week and I think Senator Chabert is the one.

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[209] BY SENATOR THOMPSON:

But my question was did, were you approached by various members of our Congressional Delegation to, to draw up a plan or give some demographics and numbers and percentages and so forth, did they or did they not?

BY MR. KOEPP:

Yes, sir. And let me make it, what I told you was, they had drawn a plan, and I don't know where they did it, they did it in Washington, and I'm not sure who was involved in it, but it was delivered to my office and I was asked to put it into our system so that we could produce the demographics from our system to see whether or not it worked and what were the results of that plan. It was very, very general, it was uh, put X number of people or about so many from this parish and this parish, or whatever, I did that and that is available, I do have that plan.

BY SENATOR THOMPSON:

[210] Uh, –

BY SENATOR BRINKHAUS:

What I understand, excuse me, Steve, –

BY SENATOR THOMPSON:

No, go ahead, Mr. Chairman.

BY SENATOR BRINKHAUS:

Well, no, but do you—

BY MR. KOEPP:

But it was dropped.

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[218] BY SENATOR BAGNERIS:

Did I understand that the Thompson plan had input from Dr. Stokley and Mr. Hays?

BY MR. KOEPP:

Mainly Senator Thompson had a plan that I, I assume, or I guess, came originally from the plaintiffs. He asked me to uh put this into our system, and I did meet with them to talk about the differences, and uh our database is somewhat different from theirs. They have a database, their expert has a database that is actually uh, the precincts in it are pre-1990, ours have been changed a number of times since then, and so there are some differences and I did, Senator Thompson did get me to do that.

BY SENATOR THOMPSON:

My, yeah, Senator Bagneris, I uh, my problem with the plan is, is not a minority black district, it's that North Louisiana is being disenfranchised by having only one Congressional District. [219] That was my reasoning for, I called Glenn and discussed it with him and discussed it with the plaintiffs. That is the basis of my filing the bill. Uh, we're looking at, if the plan that we're looking at and the one that I suspect is gonna come out of here, we're gonna have one Congressional District in North Louisiana, and uh I think that's unfair. We're being disenfranchised, and on top of that, anyone who runs for these Congressional Districts, they will, if it comes out like I think it will, they will be from Baton Rouge South, and that's, that is the basis of my filing the bill.

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[222] BY MR. KOEPP:

I got the uh, the one that seems to be a, in the late '60's and then the one [223] that's passed for '72 to '80.

BY SENATOR BRINKHAUS:

Did you have the '80 one done up also so you can do the overhead?

BY MR. KOEPP:

Yes, sir. Didn't we, –

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[227] BY SENATOR CHABERT:

Anyway, when Koepp was here I was gonna try and clarify that. Koepp gave, I got a map that was sent to me that I gave to Koepp from the Congressmen, okay. Glenn is, he's sending somebody for it right now. I will be more than happy to show it to anybody and everybody who wants to see it because after we looked, and like Senator Greene and Bagneris and all, and Thompson, I spent a lot of time up there on the computer with Glenn and, quite frankly, that's why I was pleased when I saw ya'll throw up this Eighth Congressional, the old deal, because that's what Glenn said. I came there one morning at 7:30, 8:00 o'clock, Glenn says, "I got it, the old 8th, this is what we got to work off of", and quite frankly, that's how the thing came off of, and I think he had some conversation

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[235] BY SENATOR BRINKHAUS:

What I would like to see is the display, if you have them ready, of the '60's, '70's and '80's Congressional reapportionment.

BY MR. KOEPP:

There's one thing that uh is interesting to note, that it looks like in the late '60's that the Louisiana Legislature was doing redistricting a lot more than we were. It seemed they did it every two years for a while there. Uh, but what I have is uh, the, I got three previous—

BY SENATOR BRINKHAUS:

[236] Do you have need some enlightenment at the desk?

BY MR. KOEPP:

Not right now. Uh, I got three previous plans that I'm gonna put up.

BY MS. GUIDRY:

Do you have them?

BY MR. KOEPP:

Yeah, they're right here in order.

BY SENATOR BRINKHAUS:

I wish you'd refer to those as laws dealing with reapportionment, Congressional Districts as distinguished from plans.

BY MR. KOEPP:

They are, they were, this is the statutes in uh '70, well, uh '60.

BY MS. GUIDRY:

'65.

BY MR. KOEPP:

Yeah, but it was in the '60's, but this is the uh, this is the districts they ran on in '70, and if you will notice the, the top green district is the one I'd talked about earlier that goes from [237] Natchitoches, in Natchitoches Parish, although Natchitoches Parish is split, there are a few precincts that are not in, they're in the dark blue district, which is, I believe, Number Four up in the Caddo area and also Winn Parish.

BY SENATOR BRINKHAUS:

That was Joe Wagner's district and to the right was Congressman Otto Passman's.

BY MR. KOEPP:

Right. And if you will notice that the Fifth comes down through Concordia Parish and then goes to the East in the

Florida Parishes in the districts of, and in the area of uh East and West Feliciana, St. Helena and a portion of St. Tammany. Now, again, I reiterate that these are, Tangipahoa, I'm sorry. Again, I reiterate that these are, these maps are approximations because we no longer have the exact figures and it would take quite a while to pull them out, but at least we know what was split and what wasn't under the statute and [238] that's the way this was put together.

BY SENATOR BRINKHAUS:

Excuse me, you said approximations, let's talk about Tangipahoa, it did take in part of Tangipahoa, you just don't have, –

BY MR. KOEPP:

Up on that top end.

BY SENATOR BRINKHAUS:

All right. You just don't have that precinct data available today?

BY MR. KOEPP:

Right, exactly. It was more Ward data back in those days and they were invisible boundaries that we no longer have in old Wards, so, and I can read you exactly what was in it, but it did split that area. The Eighth District, like I said, went from Sabine and Natchitoches Parishes, and as best as I could figure, as best as I could figure out it looked like it actually went uh, the portion of uh, of Natchitoches that was in it went all the way to Red River and DeSoto, because that side of [239] Natchitoches, it seemed like from the, from the number count that I was looking at and some old maps that I had had that uh the cut for Natchitoches was in the Northeast part of Natchitoches that went into the uh, the Fourth District on the top. So the Eighth District came all the way down, it took a portion of, and split Ascension Parish, and then went on into St. James and St. John, if you notice. So it goes from St.

John all the way to the top of Natchitoches in this particular one.

BY SENATOR BRINKHAUS:

Wait, excuse me, Glenn, let's talk about the Eastern most end of it, is that St. John, the Eastern most direction it went?

BY MR. KOEPP:

Yes. Southeast, South and East is St. John.

BY SENATOR BRINKHAUS:

All right. Can you do a progression in naming those parishes for me, starting with St. John?

[240] BY MR. KOEPP:

Okay. It's St. John and St. James, the piece of Ascension—

BY SENATOR BRINKHAUS:

All right.

BY MR. KOEPP:

And it's got Iberville, Pointe Coupee then it's got—

BY SENATOR BRINKHAUS:

West Baton Rouge.

BY MR. KOEPP:

—West Baton Rouge, I'm sorry, yes, it does have West Baton Rouge, Pointe Coupee, Avoyelles, and then it has Rapides, Allen, Beauregard, Vernon, Sabine, a portion of Natchitoches, a portion of Winn and LaSalle.

BY SENATOR BRINKHAUS:

And Grant?

BY MR. KOEPP:

Grant, I'm sorry.

BY SENATOR BRINKHAUS:

Grant's just North of Rapides, okay.

BY MR. KOEPP:

It doesn't have any of St. Landry in it.

[241] BY SENATOR BRINKHAUS:

No, that's not, none of St. Landry is in it. St. Landry was traditionally in the Seventh Congressional District from the time –

BY MR. KOEPP:

Right.

BY SENATOR BRINKHAUS:

– whence the memory of most men and women ran not to the contrary.

BY MR. KOEPP:

Right.

BY SENATOR BRINKHAUS:

It was in 1972 when the new Eighth District came in that it put Evangeline and St. Landry.

BY MR. KOEPP:

Right. We'll look at that in a second, but the Third took all of uh, Lafayette was in the Third in that time and it went down uh to St. Charles, and Lafourche is as far as it went to the East. The Sixth District took in East Baton Rouge, the Northern half of Ascension, Livingston, uh the bottom of [242] Tangipahoa, Washington, all of Washington and all of St. Tammany in that time. And then, historically, if you remember, Orleans Parish and Jefferson Parish were basically split, both of which were split between the First and Second. And it was in 1980 that we made Orleans almost completely whole. Orleans was enough for a whole Congressional District in 1980, plus an additional twenty-six thousand, I believe, that we had to cut out for "one man, one vote" that went into the First. But that was the first time that that district became, in the Orleans area for some time, was in a single Congressional District, and this plan split them both. Then we, the next uh change was made for the election in 1972.

BY SENATOR BRINKHAUS:

All right. Now, prior to that, prior to the '72 thing, while you're getting your map up, you had Edwin Edwards in the Seventh, Pat Caffrey in the Third, what, Edwin

Hebert in the First, and who was [243] in the Second in those days? The Sixth was Jimmy Morrison, I believe.

BY MR. KOEPP:

Boggs?

BY SENATOR BRINKHAUS:

Hale Boggs, yes, Hale Boggs and Edwin Hebert then would be First and Second, then Jimmy Morrison and, I guess, Speedy Long in the '60's, and then Otto Passman and Joe Wagner. Now, what we are seeing is the 1972 reapportionment?

BY MR. KOEPP:

Yes. And in '72, I think if you remember what it looked like, what happened is, all these districts start shifting South because the population started growing in the South and not in the North. The districts came down, you see the Eigth District came out of uh, all of Vernon, Sabine, Grant, what it had in Winn, what it had in Natchitoches, and a portion of what it had in the uh—

BY SENATOR BRINKHAUS:

Beauregard.

[244] BY MR. KOEPP:

—Rapides.

BY SENATOR BRINKHAUS:

And Beauregard and Allen.

BY MR. BAER:

Rapides, yeah. And it pushed down, so you can see the drastic changes that started occurring and the district started moving to the South, and that's because of population shifts. Uh, the Eighth District still went from the top of Rapides in that time all the way through St. John Parish. It took uh, in that time split and took a piece of Livingston off the bottom, it was a portion, and it took uh Assumption, St. James, Ascension, then Iberville, West Baton Rouge. It took uh Pointe Coupee and a portion of West Feliciana, and I guess this was the first time you said that St. Landry went into the Eigth District and out of the old Seventh. It took Evangeline, a piece of Allen, a portion, or the largest portion of Rapides, and all of Avoyelles, and that [245] was '72 to '80. Then in '80—

BY SENATOR BAGNERIS:

Glenn, before you take that map off, is that Jefferson Parish that's split three ways?

BY MR. KOEPP:

I believe Jefferson was split three ways in the '70's, and the '80's, and the, I mean, in this first map I showed you it was split three ways, and I believe it's split three ways here too.

BY SENATOR BRINKHAUS:

Well, it appears to be—

BY MR. KOEPP:

Yeah.

BY SENATOR BRINKHAUS:

—from what I'm looking at, because the one from the '60's was the first one you showed, and this is the,—

BY MR. KOEPP:

And it was split three ways then.

BY SENATOR BRINKHAUS:

—and this the '72 reapportionment,—

BY MR. KOEPP:

Right.

[246] BY SENATOR BRINKHAUS:

—and it's split three ways again?

BY MR. KOEPP:

Right. It sure was, both times. And then in 1980, there was uh, not a whole lot of shifts that occurred during that time, but the Eighth District did change slightly. It took more of Feliciana, it took both, all the rest of Feliciana, West Feliciana, all of East Feliciana, St. Helena, and it cut into, for the first time, East Baton Rouge Parish, and that's the first time we saw East Baton Rouge being split.

It still split Allen, and it went to St. John as before. And that's the one uh that we had until 1990, and Jefferson is split three ways in that district, in that plan.

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[247] BY SENATOR BRINKHAUS:

And I'm curious, how many parishes are divided, you have Beauregard and Allen, Baton Rouge, Rapides, looks like a part [248] of Avoyelles.

BY MR. BAER:

Jefferson and Orleans.

BY SENATOR BRINKHAUS:

Jefferson and Orleans, of course.

BY MR. KOEPP:

Yes. Seven or so.

BY SENATOR BRINKHAUS:

Okay.

BY MR. KOEPP:

But historically we have divided parishes, that's not something that uh—

BY SENATOR BRINKHAUS:

But we've divided them especially after the "one man, one vote" after,—

BY MR. KOEPP:

Right.

BY SENATOR BRINKHAUS:

—which occurred for the reapportionment after 1970.

BY MR. KOEPP:

Really it occurred in that 1970, and since then we've been, you know, the '70 map you saw and then in the last two, [249] took that into account. So historically and traditionally.

BY MR. BAER:

After the Voting Rights Act was passed.

BY SENATOR BRINKHAUS:

Okay.

BY MR. KOEPP:

But that's a progression and when, and I bring this to the Committee, and I guess we need to make it a part of the record because all of this was part—

BY SENATOR BRINKHAUS:

Yeah, I want it part of the record.

BY MR. KOEPP:

—of the considerations in what we were looking at in our attempt to create a district, or a set of districts, that were acceptable, that uh created as little disruption as possible, that tried to meet the, or met the requirements that the Court had and the three judge panel. And when you looked at this historical, in a historical perspective of what was going on these things uh, you can see how the, the plan [250] as presented as plan One and Three came out to be developed.

BY SENATOR BRINKHAUS:

Well, it, go ahead, had you finished your statement.

BY MR. KOEPP:

Yes, sir.

BY SENATOR BRINKHAUS:

Well, it occurs to me that certainly in the 1980 reapportionment, but even more so in the first one after the Voting Rights Act in the '60's, had extensive uh, well, drawing of districts that had pockets, and particularly, that, what I would call the Fifth District in one of them, that I saw coming down from Monroe area, that would be the one from the '60's. As I recall it came down from the Monroe area and across into the Florida Parishes North of Baton Rouge,—

BY MR. KOEPP:

Right.

BY SENATOR BRINKHAUS:

—which is comparable to both, [251] comparable both to what we're doing with what we're calling now the Sixth District, Richard Baker District.

BY MR. KOEPP:

Right. It's the same, same turn that's being made through those same parishes, so this has been done before, it's not something that's new or we haven't looked at. It was in existence for some time and Congressmen were actually elected from there.

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[252] BY MR. KOEPP:

—Orleans and Jefferson were both split, basically split between the First and Second Districts all during that time. There were different splits uh, if you look at the old uh, I believe, the '66 and '68 Acts, they were, they talked about street splits, going along certain streets in Orleans and that's how they split it. And then by uh the '70, they were talking about Wards, and they were doing it at the Ward level, [253] across the State we were splitting at the Ward level basically. And, of course, we've done, we've, in essence, done away with Wards in Louisiana and we are at the precinct level and the precinct is our building block. That's the smallest building block in Louisiana that we do use for redistricting at the State level as well as Congressional.

BY SENATOR BRINKHAUS:

You know, one of the things that strikes me, people tell me "Ya'll sure do crazy reapportionment", whether it's a Police Jury District or whatever, and when you consider that the census tracking I'm going to call it, and has to be visible boundaries and then Jury Precincts or Parish Precincts and Wards have to do the same thing and then have some geographical or, rather demographic balance on a population basis and otherwise on that, you absolutely have to have it. If you look over at, is it Allen Parish, you can see on the edge of that you can't get a straight line [254] because all those precincts have, have the beginning of that with the 1980 census and the reapportionment flowing therefrom.

BY MR. KOEPP:

Mr. Chairman, you bring up a very valid and a very important point for Louisiana. If you were to look at a State like Kansas, everything is square. Every, –

BY SENATOR BRINKHAUS:

Sections and township.

BY MR. KOEPP:

–every section has a section road. The State is just literally squared across its entirety, and when they do redistricting, they've got nice, square roads all over the Counties and all over the State to do redistricting on. Louisiana, on the other hand, we have rivers, streams and bayous are our major dividing points. We don't have any square parishes, virtually. Uh, most of the boundaries are some sort of a waterway, and interesting enough we have [255] a small area in New Orleans that is not even a whole uh precinct down there that, in the computer, has more points that, in the computer, has more points in it for that area than a whole State does in the, up in the West, because it's got so many bayous and islands and that sort of stuff. So, yeah, when you try to draw real square districts in Louisiana, that doesn't uh, that doesn't work even if you're using whole parishes, because we do have, the boundaries are based on, to a great, great extent, on waterways and creeks and rivers and streams.

BY SENATOR BRINKHAUS:

Well, then, and then there are very few square sections in, and I have read books on surveying about Louisiana, and what happened, people moved to Louisiana or came here from wherever they came from, and were given or acquired, given by the Crown of whatever country or nation and/or bought from Indians, and typically it was bought fronting on a bayou or a stream one or two or three [256] arpents by the depth of so many arpents back or, then it became acres later on, nomenclature to use. And then when the government surveys came in the early eighteen hundreds they assigned sections to those irregular pieces of land and then to the Western parishes, because I notice it in particular because of St. Landry you had Evangeline, Acadia, Jeff Davis, I think probably Allen and Beauregard, but certainly Calcasieu and Cameron came out of St. Landry Parish, and when you get to the West, in the unpopulated, or away from streams, you have regular sections that are square and townships that are, well, townships are all squared, but you have regular sections. Where those irregular sections crossed the township line they simply assigned it another number in the adjacent township. So that maybe Glenn Koepp's tract, black acre piece of land crossing a township line would be in Section Seventy in one township, Seven South Range Four East and when it got to [257] Range Three East it was maybe eighty-nine, Section Eighty-nine.

BY MR. KOEPP:

Right.

BY SENATOR BRINKHAUS:

But that accounts for all the funny looking things that we have, I think, with our reapportionment. And I just wanted to observe that because I've done a lot of title examinations in, at least my area of the State, in trying to figure out how we had these things versus states that were developed later in the evolution of this nation. Have you concluded this part of your presentation?

* * * * *

[258] BY MR. KOEPP:

This is the first uh, Senate Bill One and uh—

BY SENATOR BRINKHAUS:

Now, let me ask you this, tell me how that meets all of these things that I've been reading in the, in the *Hayes* case and the issues that the judges pointed out?

BY MR. KOEPP:

Well, Mr. Chairman, first of all, in the *Hays* case they were analyzing the Fourth Congressional District as that [259] Fourth Congressional District was drawn in Act 42. And the uh, I don't think that their, what the Court found is, and what the U.S. Supreme Court seemed to say in the case *Shaw v. Reno*, was that racial gerrymandering was not illegal but was suspect and had to have, required strict scrutiny. And the Court said that there were, there are two real tests that you have to meet. One, that you have an overriding State interest to create that minority district. And two, that it is narrowly tailored to meet that overriding State interest. And the Court talked about and accepted the fact and just, just, they just never really analyzed or decided whether or not we had an overriding State interest, they just assumed we did. And their real analysis in the case is, deals with, is the plan narrowly tailored. And they found that in their, a lot of their discussions about gobbling up minority areas as it progresses through, across the Northern part of the State and down [260] and the quote they have about the sword of Zorro says that when we created that district with sixty-three percent registered voters, a seven, sixty-seven percent minority district, that we did not narrowly tailor it. And what the interpretation seems to be that once you get to that point that you meet the overriding State interest, and if that is to create a second minority district, and as soon as it is done you have to stop. And the cases seem to say that the Voting Rights Act doesn't guarantee the election of a minority in a minority district, but it guarantees them the equal opportunity to participate in the electoral process and the opportunity to elect a candidate of their choice. Even in this case the Court talked about a fifty-five percent voting age population, and I stated other uh, stated earlier in most situations across the country voting age population is the real key that they use instead of registered voters. Our registered voter [261] data is more accurate than the actual voting age population and so I think they really did interchangeably use those terms. If you will look at the bills that are presented, this Senate Bill right here, Senate Bill One, and I need to get a copy of it in front of me to talk about the, but the registered voter in it is, the bill does have, in the Second District, 55.67, I believe, percent registered voter. Interesting enough, and I don't have that statistic here, but the voting age population in this particular plan is about fifty-four point some percent. Now, when, the way we did Act 42, although the Court zeroed in and talked about the Fourth District, they also made references to the Sixth in other plans, and the fact is that we didn't need to create as bizarre districts in the other districts that we did, but we went ahead and did it anyway for whatever purpose at the time. And I think the Court was taking and looking at all of the circumstances in [262] that and although they zeroed in on the Fourth they also talked about the other districts that were out of kilter. In this plan, if any district is not drawn in square patterns it is only the Fourth and the ones that border on that drawing. And as far as the rest of the districts we don't do anything, I mean, we do very much to keep them as, if you will, look like, and the picture of them to be compact, and they all are contiguous. Another thing that is interesting to note, the Court talked about keeping political subdivisions together. They did mention parishes but another big political subdivision in the State, of course, is all the towns and villages and communities. In Act 42 we, literally, went through numerous very small towns in the State and if it had four or five precincts, two of which were minority and three which were majority, we split right up through those and took the minority precincts and put them in District Four and the [263] majority precincts and put them somewhere else. The only splits, I don't believe there are any small communities in this plan that are split. The only towns that are split, or major areas that are split, is Lafayette, Baton Rouge, Alexandria and Shreveport. The other towns are maintained, or cities are maintained whole as units. You can make this district like we did before, much higher than a fifty-five percent, but following the Court mandate that you narrowly tailor your plan, we did that. This plan is narrowly tailored to go to fifty-five percent. It creates a minority district, but it doesn't go beyond that. It gives minorities an opportunity to elect a candidate of their choice. It gives them access to the political process. Yes, in 1991 when we did the plan, the Court talked about, and one of the, one of the things that we put forward, of course, was incumbents, and consideration of incumbents, and the [264] Court makes a real pointed statement that there was no incumbent considered when the creation of the Fourth District was made and it wasn't made because of incumbents, that's true. Incumbents were considered in this, including an incumbent in this, and will be in this Fourth District, that is true, we did consider that. So we tried to keep units and communities that, in the past, have been together. Yes, it does stretch further to the North than the old Eighth did, but remember we only have seven Congressional Districts now, not eight, and I submit to you that if we would have maintained our Eighth Congressional District our job would have been much easier. It will have looked shorter and more compact and still been a significant minority district. So the loss of a Congressman has caused quite a bit of changes and disruptions across the whole State.

BY SENATOR THOMPSON:

I have a question.

STATE EXHIBIT 4

District Summary

Total Population and 1994 Registered Voters
Plan: ACT 1 1994 2ND ES

type: CONGRESSIONAL FOR 1994

District Name	Total Pop.	Total White	Total Black
District 1	602,919	516,833	71,521
	100.00%	85.72%	11.86%
District 2	602,817	214,029	367,600
	100.00%	35.50%	60.98%
District 3	602,860	461,661	124,284
	100.00%	76.58%	20.62%
District 4	602,850	245,541	351,890
	100.00%	40.73%	58.37%
District 5	602,888	431,631	165,480
	100.00%	71.59%	27.45%
District 6	602,863	484,383	110,230
	100.00%	80.35%	18.28%
District 7	602,776	485,060	108,276
	100.00%	80.47%	17.96%
Total	4,219,973	2,839,138	1,299,281
	100.00%	67.28%	30.79%

STATE EXHIBIT 4—Continued

District Summary

Total Population and 1994 Registered Voters
Plan: ACT 1 1994 2ND ES

type: CONGRESSIONAL FOR 1994

District Name	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
District 1	332,958	296,713	31,844
	100.00%	89.11%	9.56%
District 2	291,915	108,886	177,092
	100.00%	37.30%	60.67%
District 3	330,882	262,159	66,034
	100.00%	79.23%	19.96%
District 4	314,375	138,792	173,714
	100.00%	44.15%	55.26%
District 5	316,812	240,284	74,976
	100.00%	75.84%	23.67%
District 6	351,653	292,990	56,044
	100.00%	83.32%	15.94%
District 7	318,781	267,645	49,208
	100.00%	83.96%	15.44%
Total	2,257,376	1,607,469	628,912
	100.00%	71.21%	27.86%

STATE EXHIBIT 13

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

CIVIL ACTION NO. CV 92-15222S

RAY HAYS, ET AL, PLAINTIFFS

v.

STATE OF LOUISIANA, ET AL, DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

DECLARATION OF DR. RICHARD L. ENGSTROM

Pursuant to 28 U.S.C. 1746, I, Richard L. Engstrom, make the following declaration:

Congressional District 4 in Act 1 of the Second Extraordinary Session of the 1994 Louisiana legislature is a district in which African Americans constitute 58.37 percent of the total population and 54.41 percent of the voting age population as of 1990, and 55.26 percent of the registered voters as of January, 1994. The plaintiffs in this case have alleged that this district is a "packed" district that contains "more black voters" than is "reasonably necessary" to provide African Americans with a "realistic chance" to elect a candidate of their choice (Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 14). The plaintiffs further suggest that "districts with thirty-five (35%) to forty-five (45%) percent black citizens" would be sufficient to provide African Americans in Louisiana with such a realistic chance (*ibid.*, at 16). The electoral history of this state, reviewed below, supports neither of these assertions.

Congressional Elections in Louisiana

African American voters in Louisiana have registered a preference for African American candidates over white candidates in congressional elections on nine occasions since 1984. On only three of these occasions has the African American candidate been elected, each time in a district in which African Americans constituted a majority of the electorate. An African American majority has not been a sufficient condition for the election of African American candidates, however, and no African American candidate has won a congressional election, at least in this century, in a district in which whites constituted a majority of the elctorate.

The first election of an African American to Congress this century did not occur until 1990, when William Jefferson was elected in District 2, a New Orleans-based district created following the *Major v. Treen* decision [574 F. Supp. 325 (E.D. La. 1983)]. The election of an African American in that district was ensured that year when, as a consequence of the October primary, two African Americans advanced to the November runoff. The African American percentage of the registered voters in the district had increased to almost 60 percent (59.9) by the time of the 1990 primary. While African Americans constituted a lower percentage, 59.2, of the people receiving ballots that day, they are estimated to have been 60.0 of those voting in the congressional contest. (This and all following estimates of voting behavior contained in this report are based on weighted regression analyses.) The candidate of choice of the non-African American voters in this election was a white candidate, Harwood Koppell, but Mr. Koppell received only a plurality, 45.1 percent, of their votes.

In 1992 Mr. Jefferson was reelected in the October primary from the new District 2 created by Act 42 of the

1992 Louisiana legislature. African Americans constituted 60.2 percent of the people registered to vote in that primary. While they again constituted a lower percentage of the people receiving ballots that day, 58.3, they were estimated to have once again been around 60 percent (60.1) of those voting in the congressional contest. Mr. Jefferson received over 70 percent of the votes cast in this election and was the choice of both the African American and the non-African American voters. One of his opponents was a white candidate who received only 11.1 percent of the votes cast.

A second African American was elected to Congress in 1992, when Cleo Fields was elected from the Fourth District created by Act. 42. The election of an African American in that district was also ensured when, as a consequence of the October primary, two African Americans advanced to the November runoff that year. African Americans constituted 63.3 percent of the people registered to vote in that primary. In this election they constituted an even higher percentage, 65.8, of the people receiving ballots, and an estimated 66.6 percent of those voting in the congressional election itself. The candidate of choice of the non-African Americans in this election was Steve Myers, who received an estimated 23.1 percent of their votes.

An African American majority has not been a sufficient condition to ensure the election of an African American candidate of choice, however. In 1984 an African American candidate, Israel Augustine, sought the newly created District 2 seat against an incumbent, Lindy Boggs. Voter registration in the district at that time was 54.9 percent African American, very close to the figure for District 4 in Act 1, and well above the 45 percent upper limit that plaintiffs have suggested is sufficient for African Americans to determine the outcome of elections. Data reflecting the number of African Americans and non-African Americans receiving ballots that day are not available for elections prior to 1988, but the estimated participation rates in the congressional election itself are close to equal, resulting in African Americans constituting 54.5 percent of those voting in this election. Mr. Augustine was the choice of the African American voters in this district, but was not elected because he received far fewer votes from non-African Americans than Ms. Boggs received from African Americans. Mr. Augustine receiving an estimated 64.4 percent of the votes cast by African Americans. Ms. Boggs on the other hand received over 90 percent (90.5) of the votes cast by the non-African Americans and 34.6 percent of those cast by the African Americans. Mrs. Bogggs therefore defeated Mr. Augustine, 60.1 percent to 38.6 percent.

African American voters have shown a preference for African American candidates on five other occasions since 1984. These have all occurred in what was then District 8 in the districting arrangement adopted following *Major v. Treen*. District 8 had the second highest concentration of African American voters in that eight district arrangement. African American candidates sought that congressional seat in 1986, 1988, and 1990. The district had an African American population of 38.42 percent in 1990, and a voting age population of 35.94 percent. Voter registration in the district was around 35 percent African American in each of these elections. Despite support levels among the African American voters that often exceeded 90 percent, the African American candidates were always vetoed by the non-African American voters in this district.

The first attempt by an African American candidate to win the District 8 seat was by Faye Williams in 1986. Voter registration at the time of the 1986 primary in District 8 was 35.3 percent African American. The estimated percentage of African Americans among those voting in this congressional election was 34.6. Ms. Williams was the choice of an estimated 68.3 percent of the African American voters but only 3.3 percent of the non-African American voters. The remaining non-African American vote was divided among four white candidates, allowing Ms. Williams to finish first in the primary with 25.6 percent of the votes and advance to the November runoff with a Republican candidate, Mr. Clyde Holloway, who received 23.1 percent of the votes.

Between the primary and the runoff election, non-African American voter registration increased by 11,111 while African American registration increased by only 851, reducing the African American percentage among those registered to 34.7. Participation in this runoff election was extraordinarily high, given that there was not a simultaneous presidential or senatorial election that day. African American participation in the runoff (estimated to be 67.3 percent of those registered) was almost four percentage points higher than that for the non-African American (63.4 percent), resulting in African Americans constituting an estimated 36.0 percent of those voting in this election. The level of support for Ms. Williams among the African American voters is estimated to have been 97.0 percent. Despite this African American mobilization and near unanimity for Ms. Williams, she still lost the election because close to 80 percent (78.4) of the non-African Americans voted for her opponent, Mr. Holloway. This resulted in Ms. Williams receivng 48.6 percent of the votes and therefore losing the election.

Ms. Williams attempted to unseat Mr. Holloway in the next election, in 1988. Voter registration was back up above 35 percent (35.1) African American for the 1988 primary. African Americans constituted 35.3 percent of those receiving ballots in this election, and an estimated

36.0 percent of those actually casting votes in the congressional race. Ms. Williams' support among the African Americans is once again estimated to have been above 90 percent (91.0), while her support among the non-African Americans was again only 3.3 percent. Her African American support was sufficient to place her in a another runoff with Mr. Holloway. Ms. Williams received 34.2 percent of the votes cast in this five candidate election, compared to Mr. Holloway's 43.6 percent.

Voter registration for the runoff election remained above 35 percent (35.2) African American. While African Americans constituted a lower percentage, 34.3, of those receiving ballots in this election, they are estimated to have cast 35.2 percent of the votes in the congressional election. Ms. Williams is again estimated to have received over 90 percent (96.7) of the votes cast by African Americans. She again lost the election, however, because 85.1 percent of the non-African Americans supported Mr. Holloway. This left Ms. Williams with 43.2 percent of the vote.

Prior to his election in District 4 in 1992, Cleo Fields also challenged Mr. Holloway for the District 8 seat in 1990. The African American percentage of the voter registration for that primary was 35.9. African Americans constituted a lower percentage of those receiving ballots however, 33.9, and were estimated to have been 33.5 percent of those casting votes in the congressional election. Mr. Fields was the choice of 84.7 percent of the African Americans, but only 3.2 percent of the non-African Americans. This left Mr. Fields with 29.6 percent of the votes. Unlike the 1986 and 1988 primaries, in which there were multiple white candidates dividing the non-African American vote, only one white Democrat, "Joe" McPherson, contested the seat in this primary and he received less than 20 percent of the non-African American vote. The division in the non-African American vote between

Holloway and McPherson was therefore insufficient to allow Mr. Fields to advance to a runoff.

District 8, despite having an African American population, voting age population, and usually voter registration that exceeded 35 percent, certainly was not a district in which African American voters, given white crossover, determined the outcome of elections. To the contrary, despite very impressive levels of African American support for the African American candidates (84.7 percent for Mr. Fields in the 1990 primary, and 97.0 and 96.7 percent for Ms. Williams in the 1986 and 1988 runoffs, respectively), these candidates were always "vetoed" by the non-African American voters in the district. Indeed, not only was District 8 not a district in which African American voters determined the outcome of elections, it cannot even be considered, in any empirical sense, an "influence" district. For example, over the four sessions of Congress from 1987 through 1990, Mr. Holloway, despite having the second highest number of African American constituents among Louisiana's congressman, ranked last among the state's delegation in support for civil rights measures endorsed by the Leadership Conference on Civil Rights, having supported the position of the Leadership Conference on roll call votes only six percent of the time. Mr. Holloway specifically opposed both the House and conference committee versions of the proposed Civil Rights Restoration Act in 1990, and was even one of the few Republicans in Congress to oppose the bipartisan compromise that resulted in the Civil Rights Restoration Act of 1991. Indeed, the plaintiffs' expert witness in this case, Professor Ronald Weber, in response to a question of whether Mr. Holloway was responsive to African American voters, testified at the 1992 hearing that he thought Mr. Holloway had been "unresponsive" (transcript p. 281).

Louisiana's congressional election experience does not support the plaintiffs' assertion that a district around 55 percent African American in voting age population or voter registration is a "packed" district containing more African American voters than reasonably necessary to provide African American voters with a "realistic chance" to elect a candidate of their choice. Neither does it support the plaintiffs' suggestion that districts in which African Americans constitute 35 to 45 percent of the citizens will provide such an opportunity. Indeed, Louisiana's experience does not even support a conclusion that districts within that range of minority population will necessarily result in a member of Congress being responsive to minority interests.

State Legislative Elections

Just as no African American has been elected to Congress from Louisiana in a district with a white voter registration majority, neither has an African American been elected to either chamber of the Louisiana legislature this century from a district in which whites have constituted a majority of the registered voters. The state legislative election experience also reveals, as has the congressional, that having an African American majority among the registered voters in a district is not a sufficient condition for the election of an African American candidate favored by African American voters.

The latest state legislative elections were held in 1991. Eight African Americans were elected to the state senate that year. As Plaintiffs' Exhibit 8 in the 1992 hearing of this case reveals, these eight African Americans were elected in the eight most African American districts in voter registration, districts ranging from 57.3 percent to 68.8 percent. The majority African American district with the lowest African American percentage however, Senate District 15, located in and around East Baton Rouge

Parish, did not elect an African American. Senate District 15, with a 55.1 percent African American registration (almost identical to that for congressional District 4 in Act 1) elected a white who was not the choice of the African American voters. While this candidate, Larry Bankston, received an estimated 15.7 percent of the African American vote, he received an estimated 87.9 percent of the non-African American vote, which gave him 51.2 percent of the total votes and therefore a primary election victory.

In the 1991 state House elections, 22 African Americans were elected from the 24 districts identified in Plaintiffs' Exhibit 8 as having African American registration majorities. These candidates were elected in districts ranging from 55.3 percent African American registration to 92.0. House District 102, which is listed in Plaintiffs' Exhibit 8 as 49.8 percent African American, also elected an African American, Troy Carter. The election in this district, located in the Algiers area of New Orleans, required a November runoff to determine the winner. Mr. Carter advance[d] to that runoff by finishing second in a crowded nine-candidate primary with 20.8 percent of the votes. District 102 did not have a majority white registration when Carter was elected in the runoff, as the African American registration in the district was up to 50.0 percent by that time, with African American registrants actually exceeding white registrants by about 300 (with the difference due to those classified as "other").

The results of the elections in the two majority African American districts in which African American candidates were not elected conflict with the plaintiffs' allegation that a district with a 55 percent minority registration is a "packed" district. These districts were House District 21 and House District 72, which had African American registration percentages of 53.1 and 53.9, respectively, at the time of the October primary. Despite these registration majorities, white candidates who were not the choice of African American voters were elected in both of these districts.

The white candidate elected in District 21, Bryant Hammett, received virtually no African American votes in the primary election, yet finished first in that election because he received over 90 percent (91.7) of the votes casy by non-African Americans. The candidate of choice of the African American voters was Moses Williams, who received an estimated 64.7 percent of their votes, along with 5.1 percent of those cast by the non-African Americans. When Mr. Williams faced Mr. Hammet in the runoff, Williams is estimated to have received 93.2 percent of the votes cast by African Americans, and Hammett 91.9 percent of those cast by non-African Americans. This resulted in Hammett winning this district, located in the northeast corner of the state, with 52.6 percent of the vote, because African American participation in this election was lower than that for the non-African Americans. While African Americans constituted 52.1 percent of those registered to vote in the runoff, they were 49.6 percent of those receiving ballots, and an estimated 45.6 percent of those actually voting in this legislative election.

House District 72 had an African American registration of 53.9 percent at the time of the October primary, yet a white candidate who was not the choice of the district's African American voters was elected in that district as well. The primary election in District 72, located north and west of Baton Rouge, was contested by eight candidates, four African American voters provided these four candidates only about 10 percent of their votes. The top two choices of the African American voters were both African Americans who received 28.8 percent and 24.3 percent of their votes. The first choice of the African Americans received virtually no votes from non-African Americans, however, and the second choice received only an estimated 6.8 percent. Neither made the runoff. The winning candidate, Buster Guzzardo, had been the third choice of African American voters in the primary, receiving an estimated 13.3 percent of their votes, and the first choice of the non-African Americans, with an estimated 39.0 percent of their votes. Guzzardo defeated another white candidate in the runoff. His runoff opponent had been the second choice of the non-African American voters in the primary, with 25.0 percent of their votes, and the sixth choice of the African Americans, with 7.7 percent of their votes.

The results of several other state House elections also conflict with the allegation that a 55 percent African American district is a "packed" district. African American candidates won very close runoff elections against white opponents in House Districts 11, 40, and 100, despite these districts having African American voter registration majorities at the time of 58.9, 55.0, and 61.2 percent, respectively. In District 11, in north Louisiana, Pinkie Wilkerson received an estimated 88.8 percent of the African American vote, while her white opponent in the runoff received an estimated 95.7 percent of the non-African American vote. This left Ms. Wilkerson with only 51.8 percent of the total vote. In District 40, in St. Landry Parish, Charles Hudson received an estimated 89.2 percent of the African American vote, while his white opponent in the runoff received an estimated 92.7 percent of the non-African American vote. This left Mr. Hudson with only 50.1 percent of the total vote. And in District 100, in New Orleans, David Armstrong received an estimated 79.6 percent of the African American vote, while his white opponent in the runoff received an estimated 95.4 percent of the non-African American vote.

This left Mr. Armstrong with 52.3 percent of the total vote.

Given the success of white candidates who were not the choice of African American voters in Senate District 15 and House Districts 21 and 72, and the narrow runoff victories of African American candidates who were the choice of African American voters in House Districts 11, 40, and 100, one cannot conclude that a district with a 55[%] African American registration majority is a "packed" district in Louisiana. These districts had African American voter registration majorities ranging from 53.1 percent to 61.2 percent. It is also clear that if House Districts 11, 40, and 100 had had African American registration percentages in the 35 to 45 percent range, as suggested by the plaintiffs' in this case, Ms. Wilkerson, Mr. Hudson, and Mr. Armstrong would not have been elected.

Conclusions

An examination of the recent electoral experience in Louisiana, at the congressional and state legislative levels, leads to two unmistakable conclusions. A district in which African Americans constitute about 55 percent of the registered voters is not a "packed" district in which there are "too many" African American voters. This is not a context in which African American voting strength is "wasted" as a consequence of exessive support for winning candidates.

Districts in which African Americans constitute from 35 to 45 percent of the registered voters, in turn, have "too few" African American voters to provide the minority community with a "realistic chance" to elect the candidates of their choice. The election of African Americans in majority white electoral units continues to be an exceptional, rather than normal, political event in Louisiana.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 20th day of July, 1994.

/s/ Richard L. Engstrom
RICHARD L. ENGSTROM

STATE EXHIBIT 16

UNITED STATES DISTRIC COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO. 92-1522S

RAY HAYS, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA, ET AL., DEFENDANTS

Declaration of Joesph Accardo, Jr.

I, Joesph Accardo, Jr. declare pursuant to 28 U.S.C. § 1746 as follows:

1. I live in Laplace, Louisiana in St. John the Baptist Parish and am a member of the Louisiana House of Representatives, having served in that capacity since 1972. I represent House District 57, which is comprised of portions of St. James and St. John the Baptist Parishes.

2. I served as chairman of the House of Representatives Committee on House and Governmental Affairs during the Second Extraordinary Session of the 1994 Louisiana Legislature. That committee held hearings on April 18, 1994, at which the various bills introduced by members of the House to redistrict the Louisiana congressional districts were considered.

3. Included in the bills introduced was House Bill 11, which I authored. The redistricting plan included in this bill was substantially the same as Senate Bill 1, which ultimately became, with a few minor alterations, Act 1 of 1994.

4. In introducing House Bill 11, it was my intent to provide a redistricting plan that would comport with traditional redistricting criteria such as population equality, compactness, contiguity, communities of interest, and preservation of political and geographic boundaries, and also assure that all citizens of the state would have an equal opportunity to elect the candidates of their choice. The bill that was ultimately adopted and became Act 1 meets those requirements.

5. In my participation in the redistricting process, both as chairman of the committee and as author of House Bill 11, my goal was to assure that the plan that was ultimately passed by the legislature was one that complied with all of the requirements of federal law, including Sections 2 and 5 of the Voting Rights Act and the Equal Protection Clause of the United States Constitution as interpreted by the courts in *Shaw v. Reno* and *Hays v. Louisiana*.

6. It was my belief, and that of many of my fellow legislators, that any plan passed by the legislature would have to include two districts that would afford minorities a reasonable opportunity to elect candidates of their choice to congress. I was concerned, and discussed this concern with other legislators, that a plan that did not include two such districts would be retrogressive, and under Section 2 analysis, would dilute minority voting strength, and therefore would not receive preclearance by the United States Justice Department.

7. I am a lawyer by occupation, and having reviewed the law and jurisprudence pertaining to the Voting Rights Act, I concluded that a plan that included only one majority-minority district would be subject to challenge under Section 2 of the Voting Rights Act. As demonstrated by various bills introduced in the legislature, including my House Bill 11, a second majority-minority dis-

trict could be drawn using traditional districting principles employed by Louisiana in the past. In addition, the racial bloc voting patterns prevalent in Louisiana and the inability of minorities to elect candidates of their choice from districts other than majority-minority districts, would cause serious doubt about the validity of alternative redistricting plans that contained only one majority-minority district.

8. It is common knowledge among the members of the state legislature that the minorities in this state, including those in Act 1's Congressional District 4, have suffered from discrimination in the past. Their lower social and economic status is to a large part a remnant of that past history.

9. District 4, as contained in House Bill 11 and Act 1, is similar to but in many respects more compact than the old eighth congressional district, which at one time stretched from Sabine parish down the Red and Mississippi Rivers to St. John the Baptist parish.

10. I believe that the residents of Act 1's district 4 share many common interests and concerns. It generally includes relatively poor urban and rural areas located along the Red and Mississippi rivers. For example, farmers and residents in Sabine parish have common interests with those in West Baton Rouge, the industrial plant workers in the paper plants in northwest portion of the district have interests common to those of Exxon plant workers in East Baton Rouge Parish, and the distances between them do not negate the commonality.

11. The legislature, in enacting Act 1, determined that it better served the interests of all the state's citizens. Other plans that were introduced, such as House Bill 5 and other similar plans, were disproportionately skewed in favor of north Louisiana, an area that has lost population in the 1980's relative to the rest of the state. Also, House Bill 5

and other similar plans would have adversely impacted on the ability of some incumbents to retain their seats.

13. On April 20, 1994 the House Committee on House and Governmental Affairs held a hearing to consider Senate Bill 1, which had been passed by the Senate with amendments. The Senate amendments had moved Sabine parish from the Fourth to the Seventh Congressional district and made various other changes in East Baton Rouge and four other parishes. The committee amended the bill to remove the Senate amendments, and made additional changes that had the effect of making the towns of Eunice in St. Landry Parish and Carencro in Lafayette Parish whole, and moving other portions of St. Landry and Lafayette parishes from the Fourth to the Seventh congressional district.

12. The changes made by the committee were not based on racial considerations, but were due to political and historical considerations, including an effort to decrease the number of split municipalities and preserve as much as possible of Congressman Hayes' traditional electoral base. The area of Lafayette Parish moved into District 7 is in fact slightly higher in minority population than the population in Sabine parish which was placed in District 4. However, the areas in Lafayette parish moved by the House committee amendments had been in District 7 in the 1980's congressional districting plans and in District 7 in the Act 42 plan, whereas Sabine parish had not previously been represented by Congressman Hayes. Thus the shape of the boundaries in Lafayette and St. Landry parishes were influenced by non-racial factors.

13. Senate Bill 1 was passed out of committee as amended in the manner described above, and was subsequently passed by the House and Senate in the form it left the House committee.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 19th day of July, 1994.

/s/ Joseph Accardo, Jr.
JOSEPH ACCARDO, JR.

STATE EXHIBIT 18

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

Civil Action No. 92-CV-1522

RAY HAYS, ET AL, PLAINTIFFS

v.

STATE OF LOUISIANA, ET AL, DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

DECLARATION OF RAYMOND A. JETSON

Pursuant to the provisions of 28 U.S.C. 1746, I, Raymond A. Jetson, declare as follows:

1) I live in Baton Rouge, Louisiana in East Baton Rouge Parish and I am a member of the Louisiana House of Representatives. I represent House District 61, and I have served as Representative for that district over the last ten years. I am currently the Chairman of the House Committee on Transportation, Highways and Public Works.

2) I am a resident of and registered voter in Congressional District 4, which is currently represented in Congress by Representative Cleo Fields. I was also a resident and registered voter in Congressional District 4 as it was constituted at the time of the 1992 congressional elections. I have been very active in civic and political affairs in my community for many years.

3) During the second extraordinary session of the Louisiana Legislature in 1994, I supported Act No. 1, a congressional redistricting plan that had been passed by the Louisiana Senate and had been sent to the Louisiana House of Representatives. I supported this plan because it was in the best interest of all persons in Louisiana. Even-

tually the House did vote in favor of the Senate plan and Act No. 1 became law.

4) There are no tapes or transcripts of which I am aware that record the various statements and speeches made on the floor of the Louisiana House of Representatives during its consideration of Act No. 1. During the debate on the House floor, and before the House and Governmental Affairs Committee, I stressed the commonality of interests and characteristics shared by all of the persons who resided within proposed congressional district 4. I did so without regard to and without reference to the racial make-up of the district, or the race of the persons within proposed district 4.

5) I provided each member of the Louisiana House of Representatives with a handout which detailed some of the common characteristics of the persons in the proposed congressional district 4. The handout contained official data from the 1990 census and set forth information on persons who lived in parishes that were included, in whole or in part, in proposed congressional district 4. The handout was prepared at my request by a staff member of the Louisiana House of Representatives. The information contained in this handout, a copy of which is attached to this Declaration, was before each member of the Louisiana House of Representatives when they considered Act No. 1. The handout demonstrates how the persons grouped within District 4 under Act No. 1 share similar economic, educational and employment characteristics.

6) In all of my comments before the House and before the House and Governmental Affairs Committee, I stressed the commonality of the persons within District 4, and I did so without regard to the race of the persons. For example, I pointed out that the persons who live in the parishes that are covered in whole or in part by District 4 have similar levels of income, similar levels of educational at-

tainment and share similar employment or occupational characteristics. These data, I argued, showed how *all* of the people within District 4, whether black or white, share common concerns about the education of their children, about the income they were receiving, and about the types of jobs they held. It is my belief that the people in District 4 share common concerns and needs, whether they are urban blacks in Baton Rouge or rural whites and blacks living in DeSoto Parish. In my view, the data helped to convince my colleagues in the House to support the plan in Act No. 1 without focusing on the racial characteristics of District 4 or the race of the person who could represent that district.

7) In my statements on the House floor and before the House and Governmental Affairs Committee, I also stressed that the plan that had been approved by the Senate and was contained in Act. No. 1 reflected a traditional approach to redistricting that had been taken by Louisiana in the past. Since the new District 4 resembled old congressional District 8, I stressed how the plan had the historical advantage of having been the basis for prior congressional districting, and that it thus served an important governmental interest.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Raymond A. Jetson

RAYMOND A. JETSON

July 18, 1994

U.S. EXHIBIT 9

IN THE UNITED STATES DISTRIC COURT FOR THE WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

CIVIL ACTION NO. CV 92-1522S

RAY HAYS, ET AL., PLAINTIFFS

v.

STATE OF LOUISIANA, ET AL., DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

DECLARATION OF PEYTON McCRARY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

CIVIL ACTION NO. CV 92-1522S

RAY HAYS, ET AL, PLAINTIFFS

v.

STATE OF LOUISIANA, ET AL, DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

DECLARATION OF DR. PEYTON McCRARY

Pursuant to 28 U.S.C. 1746, I, Peyton McCrary, make the following declaration:

1. My name is Peyton McCrary, and I reside in Arlington, Virginia. I am an historian employed since August, 1990, by the Voting Section, Civil Rights Division, of the Department of Justice. My responsibilities include the planning, direction, coordination, or performance of historical research or statistical analysis in connection with litigation. On occasion I am asked to provide written or courtroom testimony on behalf of the United States.

2. I received B.A. and M.A. degrees from the University of Virginia, and obtained my Ph.D. from Princeton University in 1972. My primary training was in the history of the United States, with a specialization in the history of the South during the 19th and 20th centuries. For 20 years I taught courses in my specialization at the university level, most recently as Professor of History at the University of South Alabama. In 1979 the Louisiana Historical Associa-

tion awarded my book, *Abraham Lincoln and Reconstruction: The Louisiana Experiment* (Princeton, N.J., Princeton University Press, 1978), the L. Kemper Williams Prize for the best book in the field of Louisiana history published in the preceding year. I have also published ten journal articles, book chapters, or review essays, and delivered five as yet unpublished conference papers. Seven of my published essays and three unpublished papers focus on the history of discriminatory election laws in the South, evidence concerning discriminatory intent or racially polarized voting presented in the context of voting rights litigation, or the impact of the Voting Rights Act in the South. I continue to publish scholarly work on these topics while employed by the Department of Justice.

3. I have presented courtroom testimony as an expert witness in 15 voting rights cases, for the most part during my service as a university faculty member. In one instance, however, I testified on behalf the United States as amicus curiae after my employment by the Department of Justice. In addition, I have presented sworn written testimony in five cases, once on behalf of the United States, after my employment by the Department of Justice. While a faculty member at the University of South Alabama, I also served as a consultant in at least 25 lawsuits that settled before trial. In most instances my testimony dealt with the issue of legislative intent in adopting or maintaining at-large elections, numbered place or majority vote requirements, or methods of appointing local governing bodies.

4. A detailed record of my professional qualifications is set forth in the attached Curriculum Vitae, which I prepared and know to be accurate.

5. At the request of attorneys in the Voting Section, Civil Rights Division, U.S. Department of Justice, I have summarized in this declaration historical evidence concerning: 1) racially discriminatory election laws in Louisiana; 2) voting rights lawsuits in Louisiana since 1965;

and 3) enforcement of Section 5 of the Voting Rights Act in Louisiana.[1] This testimony is drawn from my research over the last 13 years concerning discriminatory election laws in the South. Among the sources I have consulted concerning Louisiana election laws are: published work by historians, political scientists, and sociologists; published records of Louisiana state agencies and official bodies; unpublished records of various state agencies and official bodies; unpublished records of state and party officials; newspaper accounts of the deliberations of the Louisiana legislature; copies of election returns maintained by parish governments or state agencies; and copies of data compiled by the U.S. Bureau of the Census. For purpose of this declaration, however, I have cited wherever possible only readily available public documents, court cases, scholarly treatises, and public documents in the files of the U.S. Department of Justice.

Discriminatory Election Laws in Lousiana Before 1965

6. In 1964, the year before adoption of the Voting Rights Act, only 14 percent of the nonwhite voting-age population in Louisiana was registered to vote, yet 86 percent of the white voting-age population was on the registration rolls.[2] This dramatic disparity was the direct result of a series of discriminatory election laws, according to the United States Supreme Court, which enjoined further use of the state's requirement that prospective voters demonstrate to the satisfaction of local registrars that they could understand or interpret a passage from the state or

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[1] For purposes of this declaration I have not included references to litigation or Section 5 decisions regarding judicial elections in Louisiana.

[2] United States Commission on Civil Rights, *Political Participation* (Washington, D.C., G.P.O., 1968), 242-43.

federal constitutions. This registration test, like its predecessors, was racially neutral on its face but had been administered in a racially discriminatory manner.[3]

7. First widely enfranchised during the Reconstruction period, black citizens still comprised 45 percent of Louisiana's registered voters as late at 1896, when the legislature adopted two new laws designed to disfranchise as many blacks as possible, even if it also had the effect of disfranchsing poorly educated whites as well. One law provided a complex new Australian ballot and prohibited election officials from assisting illiterates. The other required all voters to re-register using a complex application form, prohibited explanation of application questions, and facilitated wholesale purges by either registrars or party officials of individuals voters who managed to register successfully. Flagrantly discriminatory application of the new laws reduced the white registration by more than half, but black registration declined by 90 percent, leaving only 10 percent of adult black males on the rolls.[4].

8. The constitutional convention of 1898 was called for the specific purpose of "purification of the electorate," according to its presiding officer, who added that had the delegates been free of concern about federal intervention they would have provided explicitly for "the exclusion from the suffrage of every man with a trace of African blood in his veins." The convention built on the foundation of the 1896 statutes.[5] Prospective voters had to

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[3] *Louisiana* v. *United States,* 380 U.S. 145 (1965).

[4] J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven, Ct., Yale University Press, 1974), 160-63.

[5] Richard L. Engstrom, Stanley A. Halpin, Jr., Jean A. Hill, and Victoria M. Caridas-Butterworth, "Louisiana," in Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, N.J., Princeton University Press, 1994), 105.

demonstrate their ability to read and write by completing without assistance a complicated application form or, alternatively, to own property with an assessed value of at least $300. Anyone registered to vote before January 1, 1867, or with a father or grandfather so qualified, was exempted from these requirements. Implementation of these disfranchising devices reduced blacks to about 4 percent of the state's registered voters, although they made up approximately half the state's population.[6].

9. In 1915 the U.S. Supreme Court struck down Oklahoma's "grandfather clause."[7] Concerned about the possibility of federal court action, a new state constitutional convention in 1921 removed the grandfather clause but added "understanding" and "good moral character" requirements to the literacy test.[8] It also placed in the constitution provisions for primary elections used by the Democratic Party to operate a "white primary."[9] The U.S. Supreme Court struck down the Texas white primary in 1944.[10]. Louisiana did not make an effort to adopt new laws in the wake of this decision, however, perhaps because black voter registration did not increase significantly in the state.[11]

10. When Earl Long became Governor in 1948, he "passed the word to parish registrars: sign up black voters," according to his biographer, because he expected

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[6] *United States* v. *State of Louisiana*, 225 F. Supp. 353, 373 (E.D. La. 1963).

[7] *Guinn and Beal* v. *United States*, 238 U.S. 347 (1915).

[8] *United States* v. *State of Louisiana*, 225 F. Supp. 353, 375-76 (E.D. La. 1963).

[9] Engstrom, et.al., "Louisiana," 106.

[10] Smith v. *Allwright*, 321 U.S. 649 (1944).

[11] V.O. Key, Jr., *Southern Politics in State and Nation* (New York, Alfred Knopf, 1949), 519.

black citizens, if enfranchised, to vote for candidtes of the Long faction within the Louisiana Democratic Party.[12] At the beginning of his term blacks were only 2 percent of the state's registered voters; by the end they were 13 percent.[13]

11. Following the decision of the U.S. Supreme Court in *Brown* v. *Board of Education*, outlawing segregation in public schools, the Louisiana legislature in 1954 established a joint committee chaired by Willie Rainach, State Senator from Clairborne Parish, and other Long opponents. Popularly known as the "Segregation Committee," its stated purpose was "to provide ways and means whereby our existing social order shall be preserved," and in order "to maintain segregation of the races in all phases of our life in accordance with the customs, traditions, and laws of our State.[14]

12. Senator Rainach was among the founders of the Louisiana Association of Citizens' Councils, which published in 1956 a pamphlet entitled "Voter Qualification Laws in Louisiana – The Key to Victory in the Segregation Struggle." In the pamphlet the organization urged its members to initiate a purge campaign to challenge the right to vote of "the great numbers of unqualified voters who have been illegally registered," and who, according to the pamphlet, "invariably vote in blocks and constitute a menace to the community." The pamplet's subtitle was: "A Manual of Procedure for Registrars of Voters, Police Jurors and Citizens Councils." The state government distributed the pamphlet to parish registrars with instruc-

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[12] Michael L. Kurtz and Morgan D. Peoples, *Earl K. Long: The Saga of Uncle Earl and Louisiana Politics* (Baton Rouge, Louisiana State University Press, 1990), 197-98.

[13] *Ibid.*, 198.

[14] *United States* v. *State of Louisiana*, 225 F. Supp. 353, 378 (E.D. La., 1963).

tions to follow its guidelines as closely as possible.[15]

13. Members of local citizens councils conducted extensive purges between 1956 and 1958 in various parishes. Following passage of the Civil Rights Acts of 1957 and 1960, the United States Department of Justice attacked these purges in the federal courts and won a series of rulings that the purges were illegal deprivations of the constitutional rights of black citizens.[16]

14. Finding that registrars had applied the state's interpretation test in a racially discriminatory manner, a three-judge panel found the test discriminatory in intent and enjoined its use in the 21 parishes at issues in *United States* v. *Louisiana*, a decision affirmed by the U.S. Supreme Court shortly before passage of the Voting Rights Act of 1965.[17]

15. Published congressional hearings on the Voting Rights Act included extensive quantitative evidence concerning racial discrimination in voter registration in Louisiana, drawn from the various federal court cases filed by the Department of Justice. In addition, the hearings reproduced substantial evidence of racial disparities in educational expenditures by the state over several decades together with documentation that these disparities were a product of the state's official policy of racial discrimination in education.[18]. Such educational disadvantages, typically correlated with disparities in socio-economic status, tend to depress voter registration and turnout, as

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[15] *Ibid.*, 379.

[16] *Ibid.*

[17] 225 F. Supp. 353 (E.D. La., 1963), *aff'd* 380 U.S. 145 (1965).

[18] *Hearings Before the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress, First Session . . . Part 2* (Washington, D.C., G.P.O., 1965), 1103-59, 1189, 1191-92, 1199-1201, 1208-10, 1220-21, 1224-26, 1229-34, 1250-52, 1263-70, 1280-81, 1412-41, 1447-55, 1479-84.

well as other forms of political participation.[19]

Implementation of the Voting Rights Act in Louisiana

16. As a result of the low level of voter registration in the state, accompanied by the existence of the restrictive tests and devices used over the preceding decades, Louisiana's literacy test was suspended by Section 4 of the Voting Rights Act, and it was among the states covered by Section 5, the "preclearance" requirement.[20] In addition, federal examiners were sent to nine of the state's parishes where the record of discriminatory registration practices was particularly dramatic. When local judges sought to block the voter registration efforts of the examiners in several parishes in the weeks following adoption of the Act, the Department of Justice successfully used its powers under the Act to eliminate all such judicial obstacles. By the fall of 1967 federal officials had added over 24,000 blacks to the registration rolls in Louisiana, and there were large increases in registration by parish officials, particularly in parishes surrounding those where examiners were stationed. By October of that year, 59 percent of the black voting age population was registered (compared with 93 percent for whites), and blacks made up approximately 20 percent of the Louisiana electorate.[21]

17. In 1968 the state altered its long-standing policy prohibiting the use of at-large elections for parish police juries and school boards by adoption of two statutes enabling both types of local governing bodies to use parish-wide

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[19] S. Rep. No. 97-417, at 29, citing *White* v. *Regester*, 412 U.S. 755, 768 (1973), and *Kirksey* v. *Board of Supervisors*, 554 F.2d 139, 145 (5th Cir. 1977) (en ban).

[20] Pub.L. 89-110, 79 Stat. 437 [42 U.S.C. 1971, 1973 et. seq.].

[21] David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* (New Haven, Ct., Yale University Press, 1978), 180-84; Engstrom, et. al., "Louisiana," 108-09; U.S. Commission on Civil Rights, *Political Participation*, 243.

elections rather than realign their single-member districts. The state was required by the decision of the U.S. Supreme Court in *Allen* v. *State Board of Elections* to submit these changes for review by the Department of Justice pursuant to Section 5 of the Voting Rights Act.[22] On June 26, 1969, the Attorney General objected to the two state enabling acts on the grounds that at-large elections would in many instance, if implemented, "have the effect of discriminating against Negro voters on account of their race." [23].

18. Between 1971 and the end of 1974, the Attorney General objected under Section 5 to 12 efforts to switch to an at-large system, or to use multi-member districts, for electing police jurors or school board members in Louisiana.[24]. During the 1970s, the federal courts struck down

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[22] 393 U.S. 544 (1969).

[23] See the objection letter of June 26, 1969, objecting to Acts 445 and 561 and 1968, and the discussion in *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1301-02 n. 7 (5th Cir. 1973) (en banc). Political scientists had long understood that at-large elections enable a white majority, if it chooses to vote as a cohesive bloc, to prevent minority representation altogether. See Robert E. Lane, *Political Life: Why People Get Involved in Politics* (Glencoe, Ill., Free Press, 1959), 270; Edward G. Banfield and James Q. Wilson, *City Politics* (Cambridge, Ma., Harvard University Press, 1963), 87-96, 307-09; Donald R. Matthews and James W. Prothro, *Negroes and the New Southern Politics* (New York, Harcourt, Brace, 1966), 4-5, 143-44, 208, 220-21; Everett C. Ladd, *Negro Political Leadership in the South* (Ithaca, N.Y., Cornell University Press, 1966), 29-30, 102-03, 307.

[24] The objections, listed in chronological order, applied to the following governing bodies: St Helena Parish police jury (May 14, 1971); Jefferson Davis Parish police jury (May 14, 1971); Jefferson Davis Parish police jury (June 4, 1971); Franklin Parish police jury (July 8, 1971); St. Charles Parish police jury (July 22, 1971); DeSoto Parish police jury (August 6, 1971); East Feliciana Parish police jury (September 20, 1971); St. Helena Parish police jury [2nd time] (Oc-

as racially discriminatory the use of multi-member districts in East Carroll, Ouachita, Plaquemines, and Rapides parishes.[25]. The federal courts also struck down at-large systems for various Louisiana municipalities.[26].

19. In 1971 the legislature incorporated multi-member districts in the New Orleans and Shreveport metropolitan areas, and in various rural parishes, into its redistricting plans for both state senate and house. The Department of Justice objected under Section 5 of the Voting Rights Act, however, citing both the dilution caused by multi-member districting and the fragmentation of black voting strength in each area.[27] A federal judge hearing a constitutional challenge to the state's redistricting plan observed that had the U.S. Attorney General not objected he would have found the districting plan unconstitutional because it was malapportioned, diluted minority voting strength, and employed "gerrymandering in its grossest form."[28]. The court ordered legislative elections to be held under its own interim plan, relying exclusively on single-member dis-

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tober 8, 1971); Ascension Parish school board (April 20, 1972); East Feliciana Parish school board (April 22, 1972); Lafayette Parish school board June 16, 1972); Evangeline Parish school board and police jury (June 25, 1974).

[25] See *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1301-02 n. 7 (5th Cir. 1973) (en banc), regarding East Carroll Parish; *Turner* v. *McKeithen*, 490 F.2d 191 (5th Cir. 1973), regarding Ouachita Parish; *Broussard* v. *Perez*, 416 F. Supp. 584 (E.D. La. 1976), regarding Plaquemines Parish; and *Parnell* v. *Rapides Parish School Board*, 425 F. Supp. 399 (W.D. La. 1976), *aff'd in part* 563 F.2d 180 (5th Cir. 1977).

[26] *Perry* v. *City of Opelousas*, 375 F. Supp. 1170 (W.D. La. 1974), *aff'd*, 515 F.2d 639 (5th Cir. 1975); *Wallace* v. *House*, 377 F. Supp. 1192 (W.D. La. 1974), *aff'd in part*, 515 F.2d 619 (5th Cir. 1975), regarding the town of Ferriday in Concordia Parish.

[27] Objection letter, August 20, 1971.

[28] *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452, 454 (E.D. La. 1971).

tricts. By the end of that decade, reports a recent study, voters had elected black representatives in 10 house districts and in two senate districts.[29].

20. Because of the state's failure to secure preclearance of at-large elections for parish governing bodies, single-member districts have subsequently prevailed in Louisiana. Such plans can, of course, be drawn in such a way as to dilute minority voting strength. In the 1970s the Department of Justice objected on 20 occasions to redistricting plans for parish police juries and school boards.[30].

21. The Department of Justice twice objected to redistricting plans for the New Orleans city council after the 1970 census.[31]. Council districts in New Orleans ran more or less from north to south, and had done so since at least 1961. Because the black residential areas tended to run from east to west through the center portions of the

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[29]. Engstrom, et.al., "Louisiana," 111.

[30] The objections to redistricting plans, listed in chronological order, involved the following jurisdictions: Assumption Parish school board (July 8, 1971); Jefferson Davis Parish school board (July 23, 1971); Ascension Parish police jury (July 23, 1971); Bossier Parish school board (July 30, 1971); Webster Parish police jury (August 6, 1971); Point Coupee Parish police jury (August 9, 1971); Natchitoches Parish school board (September 20, 1971); Caddo Parrish school board (October 8, 1971); St. James Parish police jury (November 2, 1971); East Feliciana Parish police jury (December 28, 1971); St. Mary Parish school board (January 12, 1972); Ascension Parish school board (April 20, 1972); Point Coupee Parish school board (June 7, 1972); Lafayette Parish school board (June 16, 1972); Evangeline Parish school board and police jury (June 25, 1974, and July 26, 1974); and Rapides Parish police jury and school board (December 24, 1975). U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (Washington, D.C., 1975), list 12 parishes in which minority plaintiffs had filed lawsuits challenging these districting plans.

[31] See the objection letters of January 15, 1973, and July 9, 1973.

city, this had the effect of fragmenting black voting strength. Despite the fact that blacks made up 45 percent of the city's population by the 1970s, only two of the five districts had black population majorities and blacks constituted a majority of the voting-age population in only one.[32].

22. A three-judge panel in the District of Columbia agreed with the Attorney General that the city council redistricting plan had the impermissible effect of diluting minority voting strength, but the U.S. Supreme Court reversed on the grounds that, under Section 5, a change could be defined as discriminatory in effect only if it placed minority voters in a worse position than before (making the change "retrogressive.") [33]

23. Even under the new retrogression theory established by *Beer*, however, the redistricting plan for the state house adopted by the Louisiana legislature in 1981 was discriminatory in effect, according to the Department of Jutice. By reducing the number of black-majority districts from 17 to 14, the plan would have placed black voters in a weaker position than under the plan precleared a decade earlier.[34].

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[32] Engstrom, et.al., "Louisiana," 114.

[33] *Beer* v. *United States*, 374 F. Supp. 363 (D.D.C. 1974), *rev'd*, 425 U.S. 130 (1976). Because the voting change at issue was the replacement of a districting plan adopted in 1961, before the massive increases in black voter registration brought about through the efforts of civil rights activists and, after 1965, the Voting Rights Act, observers found it difficult to imagine a plan adopted in the 1970s that could possibly have been retrogressive. As one legal scholar observed, the *Beer* decision resulted in "rewarding those jurisdictions with a history of the worst dilution of black electoral strength." Gayle Binion, "The Implementation of Section 5 of the Voting Rights Act: A Retrospective on the Role of Courts," *Western Political Quarterly*, 32 (1979), 171.

[34] See the objection letter of June 1, 1982. The redistricting plan for the state senate was precleared.

24. The Attorney General precleared the 1981 congressional redistricting plan, but black plaintiffs subsequently challenged the plan under the newly revised Section 2 of the Voting Rights Act, 42. U.S.C. 1973, under which they could show that the method of election was racially discriminatory in effect, without proving that it was discriminatory in intent.[35] Although citing abundant evidence that might have led to a conclusion that the state adopted the plan with a racially discriminatory purpose, the court in *Major* v. *Treen* chose not to reach that issue in light of its finding that congressional district boundaries in Orleans and Jefferson parishes were drawn in such a way as to dilute minority voting strength.[36]

25. The court's principal concern in *Major* was that congressional district lines fragmented black voting strength in the city.[37] The court also found that the plan's boundary between the First and Second Congressional Districts "separates cohesive black neighborhoods in the inner city

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[35] Public Law 97-205, 96 Stat. 131 (1982).

[36] *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983).

[37] The court commented that the shape of the Second Congressional District in New Orleans resembled the head of a duck. 574 F. Supp. 325, 335 (E.D. La. 1983). Louisiana had in the past tolerated congressional districts with shapes criticized at the time as unusual. In 1969, for example, the legislature adopted a plan in which the Eighth District, in which the incumbent was Speedy O. Long, extended from the Sabine River at the Texas-Louisiana border all the way east to Lake Pontchartrain. At least one political cartoon assigned eyes, mouth, and hands to the district, but within a short time comments about its shape on a map were eclipsed by concern over the *political* effects of the district lines in the New Orleans area. Opponents soon dubbed it the "Hale Boggs plan," after the long-time incumbent who stood to benefit most from the shifting of district lines in Orleans and Jefferson parishes. Richard L. Engstrom, "The Hale Boggs Gerrymander: Congressional Redistricting, 1969," *Louisiana History*, 21 (Winter 1980), 62.

which share common political and socio-economic interests premised on income, transportation, education and housing," adding that this pattern of splitting communities of interest was rarely present in regard to white neighborhoods.[38]

26. In addition, the court found that Louisiana had experienced a long history of racial discrimination in education, employment practices, public accomodations, housing, and voter registration, and that the effect of this history lingered into the present by diminishing the level of political participation.[39]

27. The court in *Major* v. *Treen* found that voting patterns in the New Orleans metropolitan area (the focus of its inquiry) were polarized along racial lines.[40] In this regard, previous vote-dilution decisions had frequently included such findings of racial polarization.[41] Even in *Beer*, the court found that voting patterns in New Orleans were racially polarized.[42] Subsequently in a number of challenges to at-large election systems at the local level, courts have made judicial findings that voting patterns

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[38] *Ibid.*

[39] 574 F. Supp. 325, 339-41 (E.D. La., 1983).

[40] 574 F. Supp. 325, 337-39 (E.D. La., 1983).

[41] See *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1301-02 n. 7 (5th Cir. 1973) (en banc), regarding East Carroll Parish; *Turner* v. *McKeithen*, 490 F.2d 191 (5th Cir. 1973), regarding Ouachita Parish; *Perry v. City of Opelousas*, 375 F. Supp. 1170 (W.D. La. 1974), *aff'd*, 515 F.2d 639 (5th Cir. 1975); *Wallace* v. *House*, 377 F. Supp. 1192 (W.D. La. 1974), *aff'd in part*, 515 F.2d 619 (5th Cir. 1975), regarding the town of Ferriday in Concordia Parish; *Broussard* v. *Perez*, 416 F. Supp. 584 (E.D. La. 1976), regarding Plaquemines Parish; and *Parnell* v. *Rapides Parish School Board*, 425 F. Supp. 399 (W.D. La. 1976), *aff'd in part* 563 F.2d 180 (5th Cir. 1977).

[42] *Beer* v. *United States*, 374 F. Supp. 363, 375 (D.D.C., 1974), *rev'd on other grounds*, 425 U.S. 130 (1976).

were racially polarized and have found that the method of election violated Section 2 of the Voting Rights Act.[43]

28. Broader confirmation of the effects of racially polarized voting in Louisiana is provided by two recent studies. One study, a comparative analysis of Southern state legislatures and congressional delegations in 1988, finds that not a single black state legislator in either house or senate was elected from a majority-white district in Louisiana, although the predicted proportion (had race not been a factor in the election process) was 21 percent of the seats in the house and 25 percent of the senate seats. In black-majority districts, however, 83 percent of the seats in the house and 100 percent in the senate were held by black legislators.[44] A second study of black officeholding on municipal governing bodies in Louisiana in 1989 finds that only 4 percent of the persons elected from white-majority single-member districts were black; by contrast, 98 percent of those elected from black single-member districts were black.[45]

29. A factor contributing to the success of single-member district plans in providing a fair opportunity for minority voters to elect candidates of their choice has been the scrutiny of the redistricting process by the Department

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[43] *Citizens for a Better Gretna* v. *City of Gretna*, 636 F. Supp. 1113 (E.D. La., 1986), *aff'd*, 834 F. 2d 496, 502 (5th Cir. 1987); *East Jefferson Coalition for Leadership and Development* v. *Parish of Jefferson*, 691 F. Supp. 991 (E.D. La., 1988), *aff'd*, 926 F.2d 487 (5th Cir., 1991); *Westwego Citizens for Better Government* v. *City of Westwego*, 872 F.2d 1201 (5th Cir., 1989).

[44] Lisa Handley and Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 338, 346 (Tables 11.3, 11.4).

[45] Engstrom, et.al., "Lousiana," 132 (Table 4.7A).

of Justice in enforcing Section 5 of the Voting Rights Act.[46] Following the 1980 census the Attorney General interposed 13 objections to parish police juries and school boards.[47]. In the 1990s the Department has objected to 37 redistricting plans for parish governing bodies.[48] At the state level, finally, the Attorney General objected to the 1991 redistricting plans for both senate and house, and to the district alignments for the Board of Elementary and Secondary Education.[49]

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[46] Engstrom, et. al., "Louisiana," 110-112.

[47] Madison Parish school board and police jury (August 16, 1982); West Baton Rouge Parish school board (November 8, 1982); Assumption Parish school board and police jury (November 30, 1982); LaSalle Parish school board and police jury (December 20, 1982); Winn Parish school board (January 14, 1983); St. Helena Parish school board and police jury (April 11, 1983); Assumption Parish school board and police jury (May 2, 1983); Caddo Parish commission (July 11, 1983); and Point Coupee police jury (August 22, 1983).

[48] Morehouse Parish police jury (September 27, 1991); Bienville Parish police jury (September 27, 1991); Jackson Parish police jury (October 8, 1991); DeSoto Parish police jury (October 15, 1991); Catahoula Parish police jury (October 25, 1991); St. Martin Parish school board and police jury (October 25, 1991); West Feliciana Parish police jury (October 25, 1991); Franklin Parish police jury (November 25, 1991); St. Landry Parish police jury and school board (December 16, 1991); East Carroll Parish police jury and school board (December 20, 1991); Concordia Parish police jury (December 23, 1991); Webster Parish school board and police jury (December 24, 1991); Richland Parish police jury (January 2, 1992); Terrebonne Parish council (January 3, 1992); Point Coupee Parish police jury (February 7, 1992); Madison Parish school board and police jury (April 10, 1992); Morehouse Parish police jury (May 26, 1992); East Carroll Parish police jury (August 21, 1992); Point Coupee Parish police jury September 10, 1992); Morehouse Parish police jury (September 14, 1992); Lafayette Parish School District (September 21, 1992); Vermillion Parish police jury (December 30, 1992; East Carroll Parish School District (January 4, 1993); West Carroll Parish School District (March 30, 1993); Evangeline Parish School District (May 24, 1993); Iberville Parish School District (June 21, 1993); St. Mary Parish School District (August 30, 1993); Bossier Parish School District (August 30, 1993); Lafayette Parish consolidated government (October 18, 1993); and Iberville Parish School District (November 24, 1993).

30. In this declaration I have recounted the history of racially discriminatory election laws in Louisiana over the last century and the efforts to overcome the effects of those discriminatory laws, both by enforcement of the Voting Rights Act of 1965 and by litigation to enforce the constitutional rights of minority citizens. As a result of the Voting Rights Act, the level of black voter registration and turnout has increased dramatically since 1965. Continuing efforts by the state and local jurisdictions to use at-large elections or districting plans which dilute minority voting strength, however, would have minimized the opportunities of these new voters to elect candidates of their choice to public office without the frequent intervention of the fedral courts or the Department of Justice in its administration of the preclearance requirements of Section 5 of the Act.

31. The level of racially polarized voting in Louisiana remains substantial. As a result, black officeholding at state and local levels is restricted overwhelmingly to jurisdictions or single-member districts in which a majority of those casting ballots on election day are black. This fact, as well as the broader record of historical discrimination in regard to voting, are matters well known to public officials and political observers in Louisiana.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of July, 1994.

/s/ Peyton McCrary

PEYTON MCCRARY

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[49] See the objection letters of June 28, July 15, and October 1, 1991.

U.S. EXHIBIT 11

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO. CV 92-1522S

RAY HAYS, ET AL, PLAINTIFFS

v.

STATE OF LOUISIANA, ET AL, DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

DECLARATION OF OLETHIA DAVIS

REPORT ON COMMONALITY OF INTERESTS WITHIN LOUISIANA'S NEWLY CREATED FOURTH CONGRESSIONAL DISTRICT

OLETHIA DAVIS
ASSISTANT PROFESSOR
DIRECTOR, VOTING RIGHTS PROGRAM
DEPARTMENT OF POLITICAL SCIENCE
SOUTHERN UNIVERSITY
BATON ROUGE, LOUISIANA

PERSONAL BACKGROUND AND EXPERIENCE

1. My name is Olethia Davis. I am a resident of the State of Louisiana.

2. I am an assistant professor and director of the Voting Rights Program in the Department of Political Science at Southern University-Baton Rouge. I received my B.A. in Political Science and Sociology from Louisiana State University, Baton Rouge, LA, and an M.A. and Ph.D. from LSU, with a concentration in American politics, voting behavior, public law, public administration, and judicial politics. A copy of my curriculum vitae is attached to this report.

3. I have conducted research in the area of political science, including the political interests and voting preferences of voters in the State of Louisiana. My doctoral dissertation was on voter turnout in Lousiana's judicial elections.

4. I was first introduced to voting rights cases while working as a research assistant to Dr. Ronald E. Weber. My interest in such cases resulted in my expanding on a data set (election results, campaign financing, and the race of judicial candidates) originally created by Professor Weber to assist the State of Louisiana in its defense of legal challenges by minority plaintiffs to Louisiana's

judicial election structures. My expansion of this data set accumulated into my dissertation research. As a result of the four years in which I worked for Professor Weber and my interest in the area of voting rights, I acquired first-hand knowledge of the relevant issues (plaintiffs' and defendants'), statistical procedures (including ecological regression and homogeneous precinct analyses), and the role of expert witnesses in such litigation.

After two years at the University of Wisconsin-Milwaukee, I returned to Louisiana and began my work at Southern University. During my first year at this university, I applied for and received a voting rights grant from the Southern Regional Council, Atlanta, Georgia. The purpose of this grant was to allow me to apply my voting rights knowledge and to establish a voting rights program at the university. Additionally, I have also learned how to draw redistricting maps. I have conducted homogeneous precinct analyses for the preliminary aspect of a voting rights case, provided sociodemographic data to illustrate economic disparities between whites and blacks in a lawsuit, prepared a preclearance objection report for a Louisiana councilman, been retained to draw a councilmanic map, and attended depositions in voting rights cases in North Carolina and California. I have not testified previously as an expert witness.

PURPOSE OF THE ANALYSIS

The purpose of this analysis is to determine whether Louisiana's newly created Fourth Congressional District is violative of "commonality of interests" factors set forth by the court in *Hays v. State of Louisiana* (LA 839 F.Supp. 1188, 1993). I will also examine District 4 in the 1994 Louisiana Congressional redistricting plan to evaluate whether it is "compact" under a "functional" view of compactness.

In its decision in this case, the court lists 3 categories of factors to be considered when ascertaining commonality of interests within a single congressional district. These factors are (1) regligion and ethnicity (2) economic base, and (3) geography and topography. The first two factors listed by the court in *Hays* will be analyzed in this report to determine the extent of commonality of interests in District 4, created by Act 1 of the Louisiana Legislature.

I have also examined District 4 in order to ascertain whether it is "functionally compact". Functional compactness involves such considerations as whether constituents and representatives can easily reach one another, whether campaigning within the district is feasible, and whether, as a practical matter, the district is capable of being adequately represented by a single person (Grofman and Handley, 1992)[1].

The units of analysis in this report are the parishes and cities, towns, or villages contained in District 4. *U.S. Census of Populations* data on parishes, parish subdivisions, and places have been relied upon in this analysis. Each locality will be categorized in terms of its location within the state-north or south. A comparison between these regions (north and south) will be employed in order to answer the following questions:

(1) whether the newly created Fourth Congressional District combines religious and ethnic groups which are distinct to north and south Louisiana, respectively.

(2) whether the Fourth Congressional District results in the formation of an "incoherent industrial base" (*Hays*, 1201).

(3) whether the Fourth Congressional District is functionally compact to such a degree whereby (a) transportation within the district is feasible and (b) campaigning and citizen contact with representatives is practicable.

I. *Religion and Ethnicity and Commonality of Interests*

Religion

Given the religious and ethnic diversity of the State of Louisiana a certain amount of mixing of religious and ethnic groups is inevitable when drawing congressional districts. I have analyzed available data to determine whether the Fourth Congressional District combines religious and ethnic groups which are presently distinct to a north-south division of the state. The sources relied upon in order to make this determination are census reports and telephone directories for the localities included in District 4. Census data were employed to determine the prevalence of ethnic groups within particular regions of Louisiana. However, the Bureau of Census no longer provides information on religious affiliation. For this reason, I used the yellow pages of telephone directories which contain a list of churches. Although relying upon telephone directories cannot provide an indication of the percentage of persons belonging to a specific religious denomination, I was able to determine whether particular religions are distinct to north or south Louisiana.

My finding is that specific religious denominations are not distinct to a particular area, north or south, of Louisiana. In fact, even within parishes as well as cities there is a multiplicity of religious affiliations, including non-denominational religious centers. In short, while certain religious denominations may predominate in certain areas of the state, religion transcends any "North Louisiana" and "South Louisiana" boundary.

Ethnicity

In order to determine whether certain ethnic groups are specific to north as opposed to south Louisiana, data were drawn from the 1990 *U.S. Census of Populations.* The census category relied upon was "ancestry". To insure inclusion of the appropriate populations, I conducted an overall analysis of ancestral groups found in parishes and parish subdivisions located in District 4. The data reveal that the dominant ethnic groups within District 4 are dispersed throughout the district. English, French, French Canadian, German, Irish, Italian, and even persons classifying themselves as having U.S. or American ancestry are present in what may be classified as northern areas of District 4 as well as the southern area.[1] Therefore, it is my conclusion that there are not distinct ethnic differences between the northern portions of District 4 and its southern components.

Since the census classifies Blacks as a racial group rather than on the basis of ethnicity, I relied upon the percentage of Blacks within the localities of District 4 as revealed by the redistricting plan. This analysis and the previous one involving ethnicity indicate that there is a substantial Black population concentration within and throughout District 4.

II. *Economic Base and Commonality of Interests*

According to the data contained in the *Louisiana Almanac. 1992-1993,* all parishes contained in District 4 have both agricultural and industrial components. In fact, in the mid-1960's Louisiana's secretary of agriculture issued a book entitled *Louisiana Agri-dustrial Directory: Agriculture and Industry in Balance,* which emphasized that the historical separation of agriculture and industry within the state no longer existed.

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[1] The only exception to the above finding is that a small percentage of persons with Scotch-Irish and Scottish ancestry were found in 2 of the 6 northern parishes and a number of the cities in this area. This ancestry group was not found in any of the southern parishes nor cities. This finding is not significant because these two ethnic groups were not present in all, or even most, of the northern area of District 4 and because the number of persons with Scottish and Irish ancestry is very small.

Furthermore, the department focused on agriculture, manufacturing, and petrochemical industries in general terms. In other words, the purpose of the directory was to link Louisiana's agriculture and industry into a productive economic base. To a large extent today, these components have spread throughout regions of the state. This is exemplified in the *U.S. Census of Population* report under the category "Occupation".

The economic base of District 4 is a combination of agriculture and industry. Although agriculture has historically played a major part in the economy of the State of Louisiana, an analysis of commonality of interests of District 4 should involve an evaluation of the economic base of a majority of the district's residents. Current census data reveals that a majority of the fourth Congressional district's residents are blue-collar workers. Extant literature in the field of political science suggest that blue-collar workers exhibit similar voting behaviors and share common interests (Wolfinger and Rosenstone, 1980; Verba and Nie, 1972, Nie *et al.,* 1976; Niemi and Weisberg, 1976).

III. Functional compactness of District 4

It is my conclusion that the Fourth Congressional District is functionally compact on the grounds of the availability of highways which connect every area of the district. For example, the district has connecting roadways (I-10, I-49, LA 71, US 61) which extend from the district's most northern city (Shreveport) to its most southern

(Baton Rouge) as well as waterways (Red River and Mississippi River) which follow the contours of the district. Railroads also parallel the northwest-southwest highway routes. These transportation facilities indicate that the district is one in which transportation between points in the district will not be difficult.

District 4 also appears functionally compact with regard to the feasibility of campaigning within the district and the capability of representing constituents. In light of the existence of modern communication techniques, Congressional franking privileges, the historical utilization of home offices as well as Washington offices, and other traditional means of representing constituents which have been employed by Congresspersons, District 4 does not appear to present any particular difficulty for a candidate in campaigning or for its representatives to effectively represent his/her constituents.

Conclusion

My analysis indicates that the newly created Fourth Congressional District meets the criteria set forth by the court in determining commonality of interests.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

/s/ Olethia Davis July 19, 1994
OLETHIA DAVIS, Ph.D.

PLAINTIFFS' EXHIBIT 4

LOUISIANA CONGRESSIONAL DISTRICTS
ACT 1 CITY/TOWN SPLITS
POPULATION AND REGISTRATION PERCENTAGES

City/Town	District	White Pop. %	Black Pop. %	White Regis. %	Black Regis. %
Alexandria	4	21.4%	78.2%	20.3%	79.3%
	6	82.9%	15.3%	86.7%	12.2%
Baker	4	71.3%	27.9%	71.0%	28.8%
	6	72.3%	27.1%	76.0%	23.9%
Baton Rouge	4	18.9%	80.3%	21.1%	78.6%
	6	87.5%	9.0%	93.4%	5.6%
Breaux Bridge	3	79.9%	19.8%	85.7%	14.2%
	4	13.3%	86.5%	15.2%	84.7%
Coushatta	4	35.4%	62.9%	36.2%	63.7%
	5	84.8%	14.2%	77.1%	22.5%
Donaldsonville	3	79.7%	20.2%	85.0%	14.6%
	4	30.6%	68.8%	32.0%	67.8%
Gonzales	3	84.1%	14.4%	88.0%	11.7%
	4	38.3%	61.7%	31.2%	68.5%
Gretna	1	83.4%	11.7%	91.3%	7.3%
	2	49.3%	48.6%	52.2%	46.4%
Kenner	1	87.6%	7.3%	92.6%	4.8%
	2	51.7%	45.3%	52.4%	45.7%
Lafayette	4	21.1%	78.4%	20.0%	79.8%
	7	86.2%	11.4%	91.3%	8.0%
Natchitoches	4	33.5%	64.5%	30.7%	67.8%
	6	86.6%	12.5%	90.3%	8.3%
New Orleans	1	92.6%	5.6%	93.9%	5.0%
	2	29.9%	66.8%	32.3%	65.8%
New Roads	4	1.5%	98.4%	1.3	98.7%
	6	78.5%	21.4%	88.5%	11.3%
Opelousas	4	26.2%	73.5%	25.4%	74.4%
	7	85.0%	14.5%	87.4%	12.1%
Pineville	4	51.5%	41.3%	53.2%	46.1%
	6	80.9%	17.7%	86.3%	13.0%
Shreveport	4	25.7%	73.8%	28.3%	70.9%
	5	88.1%	10.5%	92.3%	6.7%
Ville Platte	4	43.1%	56.6%	45.3%	54.7%
	7	81.2%	18.6%	83.7%	16.2%

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
[SEAL OMITTED]
Office of the Assistant Attorney General
Washington, D.C. 20035

April 20, 1994

VIA FACSIMILE TRANSMISSION

Brenda Wright, Esq.
Director, Voting Rights Project
Lawyers' Committee for Civil Rights Under Law
1450 G. Street, N.W.
Suite 400
Washington, D.C. 20005

Robert B McDuff, Esq.
771 North Congress Street
Jackson, Mississippi 39202

Re: *Hays* v. *Louisiana,* No. 92-CV-1522 (W.D. La.)

Dear Ms. Wright and Mr. McDuff:

This responds to your April 15, 1994, letter regarding the *Hays* v. *Louisiana* litigation, involving the challenge to Louisiana's 1992 congressional redistricting plan. We welcome your invitation for the Department of Justice to continue to work together with the Louisiana Legislative Black Caucus, which you represent, in our mutual roles as amicus curiae in this litigation.

We are aware that the Louisiana legislature is now in a special session called by Governor Edwards to consider the enactment of a new congressional redistricting plan in light of the ruling in *Hays* v. *Louisiana*, 839 F. Supp. 1188

(W.D. La. 1993), that Act 42, the congressional redistricting plan adopted in 1992, is unconstitutional and cannot be used in the 1994 elections. While we cannot comment on any particular redistricting plan under consideration, see Procedures for the Administration of Section 5, 28 C.F.R. 51.22, we believe some general observations can be made in light of the evidence adduced during the *Hays* case, and the general framework of the court's ruling.

In our supplemental brief filed in *Hays* in August 1993, we argued that the Voting Rights Act provides Louisiana with a compelling interest in drawing two congressional districts in which black voters would have an opportunity to elect candidates of their choice. That is still our view. In undertaking its congressional redistricting, Louisiana had a compelling interest in satisfying its burden of proof under Section 5 of the Voting Rights Act. Avoidance of retrogression of minority voting strength would justify the retention of the black-majority district in New Orleans. But the state also had a strong interest in adopting a plan that would not give rise to an inference of discriminatory purpose, so as to satisfy the "purpose" prong of Section 5. We believe the state was justified in concluding that it would have been unable to meet that burden if it adopted a plan with only one black-majority district, in light of the Attorney General's 1991 objection to the state's plan for the Board of Elementary and Secondary Education. That circumstance, together with the evidence of racially polarized voting in Louisiana and the availability of readily discernible alternatives for a reasonably compact second majority black congressional district, shows that the state had reason to believe a plan with two black-majority districts was necessary to obtain Section 5 preclearance.

We also argued that compliance with Section 2 of the Voting Rights Act gave the state a compelling interest to draw two black-majority congressional districts. Evidence in the record demonstrates that the three preconditions under *Thornburg* v. *Gingles,* 478 U.S. 30 (1986), are satisfied, giving Louisiana a strong basis for taking action to avoid a Section 2 violation. The plaintiffs' own plans, developed and presented at trial by Dr. Weber, demonstrate that the black population is sufficiently numerous and geographically compact such that two reasonably compact districts with black voting age population majorities can be drawn. In addition, there is uncontradicted evidence that voting is racially polarized in congressional elections, sufficient to satisfy the second and third *Gingles* preconditions.

The district court's ruling in *Hays* does not alter these judgments. In finding the 1992 plan unconstitutional, the district court assumed *arguendo* that the interests advanced by Louisiana were compelling, but then ruled that District 4 was not "narrowly tailored" to further those interests. The court's ruling is based on its conclusion that a more compact second black-majority district could be drawn and that a district with a lower percentage of black voting age residents would still provide black voters with a realistic opportunity to elect candidates of their choice. We recognize that the state has appealed the ruling in *Hays* and we concur in the view that *Hays* is wrongly decided. In fact, we are actively considering what role, if any, we will play in the appeal. Nevertheless, the court's acknowledgement that a more compact district can be drawn supports our position that Louisiana has a compelling justification to create two black-majority districts.

In sum, we believe that, under the totality of circumstances existing in Louisiana, it remains reasonable to conclude that the Voting Rights Act requires the state to devise a congressional redistricting plan with two black-majority districts. Moreover, such a plan can be devised in a way that would not run afoul of the Supreme Court's ruling in *Shaw* v. *Reno,* 113 S.Ct. 2816 (1993), or the district court's ruling in *Hays.* We recognize that there likely are a variety of plans that would accomplish those objectives and that the choice of which plan to adopt is a matter best left to the discretion of the legislature under our federal system.

Of course, the state must seek preclearance under Section 5, either from the Attorney General or from the District Court for the District of Columbia, of any new plan before it may be implemented in the 1994 elections. Should the state seek administrative preclearance through the Attorney General, we stand ready to conduct our review as expeditiously as possible, so that the state can proceed with its regular election schedule, which provides for candidate filing to occur in July.

I trust this letter provides a basis for us to continue to work together to resolve the *Hays* litigation in a way that ensures that the voting rights of the citizens of Louisiana are fully protected. If you have any further questions, you should contact Steven H. Rosenbaum, Chief of the Voting Section (202-307-3143).

Sincerely,

/s/ Deval L. Patrick
DEVAL L. PATRICK
Assistant Attorney General
Civil Rights Division

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA SHREVEPORT DIVISION

CIVIL ACTION NO. CV 92-1522S

RAY HAYS, EDWARD L. ADAMS, SUSAN SHAW SINGLETON, AND GARY STOKLEY, PLAINTIFFS

v.

EDWIN EDWARDS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA; SAMUEL B. NUNEZ, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE LOUISIANA STATE SENATE; JOHN A. ALARIO, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE HOUSE FOR THE STATE OF LOUISIANA; W. FOX MCKEITHEN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF LOUISIANA; JERRY FOWLER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ELECTIONS FOR THE STATE OF LOUISIANA; AND CERTAIN UNIDENTIFIED STATE LEGISLATORS, DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

[Filed Dec. 9, 1994]

NOTICE OF APPEAL

Notice is hereby given that the defendant-intervenor, United States, hereby appeals to the United States Supreme Court from the Judgment of the United States District Court, Western District of Louisiana (three-judge court), entered on December 9, 1994.

This appeal is taken pursuant to 28 U.S.C. 1253.

Michael D. Skinner
United States Attorney

William J. Flanagan
Assistant U.S. Attorney
United States Courthouse
300 Fannin Street
Shreveport, Louisiana
71101

Respectfully submitted,
Deval Patrick
Assistant Attorney General
/s/ Richard Jerome
John K. Tanner
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION NO. CV 92-1522S

RAY HAYS, EDWARD L. ADAMS, SUSAN SHAW SINGLETON, AND GARY STOKLEY, PLAINTIFFS

v.

EDWIN EDWARDS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA; SAMUEL B. NUNEZ, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE LOUISIANA STATE SENATE; JOHN A. ALARIO, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE HOUSE FOR THE STATE OF LOUISIANA; W. F. MCKEITHEN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF LOUISIANA; JERRY FOWLER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ELECTIONS FOR THE STATE OF LOUISIANA; AND CERTAIN UNIDENTIFIED STATE LEGISLATORS, DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR

[Filed Dec. 12, 1994]

AMENDED NOTICE OF APPEAL

Notice is hereby given that the defendants, Edwin Edwards, in his official capacity as Governor of the State of Louisiana, Samuel B. Nunez in his official capacity as President of the Louisiana State Senate, John A. Alario, in his official capacity as Speaker of the House for the State of Louisiana, W. F. McKeithen, in his official capacity as Secretary of the State for the State of Louisiana and Jerry Fowler, in his official capacity as Commissioner of Elections for the State of Louisiana, hereby appeal to the United States Supreme Court from the Judgment of the United States District Court, Western District of Louisiana (three-judge court), entered on December 9, 1994.

This appeal is taken pursuant to 28 U.S.C. 1253.

Respectfully submitted,

RICHARD P. JEYOUB
Assistant Attorney General

/s/ BY Roy A. Mongrue, Jr.

ROY A. MONGRUE, JR.
Assistant Attorney General
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LOUISIANA DEPARTMENT
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In the Supreme Court of the United States

No. 94-558

UNITED STATES, APPELLANT

v.

RAY HAYS, ET AL.

ORDER

In this case probable jurisdiction is noted. The case is consolidated with No. 94-627, *Louisiana, et al.* v. *Ray Hays, et al.*, and a total of one hour is allotted for oral argument.

December 12, 1994

In the Supreme Court of the United States

No. 94-627

LOUISIANA, ET AL., APPELLANTS

v.

RAY HAYS, ET AL.

ORDER

In this case probable jurisdiction is noted. The case is consolidated with No. 94-558, *United States* v. *Ray Hays, et al.*, and a total of one hour is allotted for oral argument.

December 12, 1994

⑥ ⑤

Supreme Court, U.S.
FILED
JAN 30 1995
OFFICE OF THE CLERK

Nos. 94-558 and 94-627

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, APPELLANT
v.
RAY HAYS, ET AL.

STATE OF LOUISIANA, APPELLANT
v.
RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

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42 pp

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QUESTIONS PRESENTED

1. Whether a State's intentional creation of a majority-minority district is always subject to strict scrutiny.

2. Whether the boundaries of District 4 in Louisiana's redistricting plan are so highly irregular on their face that they can be understood only as an effort to segregate voters into separate districts because of their race.

3. Whether District 4 is narrowly tailored to further a compelling interest.

PARTIES TO THE PROCEEDING

Plaintiffs are Ray Hays, Edward Adams, Susan Shaw Singleton and Gary Stokely.

Defendants are Edwin Edwards, Governor of the State of Louisiana; Samuel B. Nunez, President of the Louisiana State Senate, John A. Alario, Speaker of the Louisiana House of Representatives; W. Fox McKeithen, Secretary of State of Louisiana; and Jerry Fowler, the Commissioner of Elections for the State of Louisiana.

The United States intervened as a defendant.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-558

UNITED STATES OF AMERICA, APPELLANT

v.

RAY HAYS, ET AL.

No. 94-627

STATE OF LOUISIANA, APPELLANT

v.

RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The second opinion of the three-judge district court (J.S. App. 1a-23a) is reported at 862 F. Supp. 119. The first opinion of the three-judge district court (J.S. App. 39a-109a) is reported at 839 F. Supp. 1188.

JURISDICTION

The judgment of the three-judge court was entered on December 9, 1994. J.A. 9. A notice of appeal was filed on December 9, 1994. J.A. 233. This Court noted probable jurisdiction on December 12, 1994. J.A. 237. The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The relevant federal statutory provisions are Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. 1973, 1973c, which appear in the appendix to the jurisdictional statement at 117a-119a.

STATEMENT

This case concerns a challenge to the State of Louisiana's 1994 congressional redistricting plan. A three-judge court invalidated the plan after finding that it violated the standards for race-conscious redistricting established in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993).

1. The population of the State of Louisiana is more than 30% black. J.A. 179. From the end of Reconstruction until the 1980's, black voters were not in the majority in any of Louisiana's congressional districts, and no black person was elected to Congress. In 1983, a three-judge court invalidated Louisiana's 1982 congressional redistricting plan on the ground that it fragmented the minority population in the New Orleans area in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. *Major* v. *Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983) (three-judge court). To remedy that violation, a plan was adopted in which blacks constituted

a majority in a district centered in New Orleans. Louisiana had a total of eight congressional districts in that plan. In 1990, a black candidate was elected to Congress from the New Orleans-based district.

Louisiana's congressional redistricting efforts were preceded by the State's redistricting of the Board of Elementary and Secondary Education (B.E.S.E.). Traditionally, the boundaries of the eight B.E.S.E. districts had been identical to the boundaries of the State's congressional districts. The new B.E.S.E. plan contained one majority-minority district. The State submitted the plan to the Department of Justice for preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Acting on behalf of the Attorney General (28 C.F.R. 51.3), the Assistant Attorney General for the Civil Rights Division refused to preclear the plan. DX 16 (1993 Hearing). The Assistant Attorney General's objection letter noted that the B.E.S.E. plan had fragmented the minority population along the Mississippi River among three majority-white districts, that polarized voting by whites would preclude blacks from having an opportunity to elect a candidate of their choice in any of those districts, and that the State's black population was large enough and compact enough to constitute a majority in a second district that included the minority voters who lived along the Mississippi River. *Ibid.* The letter concluded that the State had not shown that its failure to create a second majority-minority district was free of discriminatory purpose. *Ibid.* In response to that objection, the State adopted a new B.E.S.E. plan that created two majority-minority districts, which the Assistant Attorney General then precleared.

As a result of the 1990 Census, Louisiana lost one of its congressional seats. J.S. App. 55a. In May, 1992, the

State legislature enacted a districting plan for the seven remaining seats. *Id.* at 39a. That plan included two majority-black districts. One was centered in New Orleans and was similar to the majority-black district in the plan used in the 1980s; the other (District 4) was a Z-shaped district that spanned a large part of the State. The State's plan was precleared by the Department of Justice.

Appellees, four voters living in Lincoln Parish, Louisiana, challenged that plan in 1992 on the ground that it segregated voters into districts on the basis of race, in violation of the Equal Protection Clause. J.S. App. 42a. The district court denied appellees' request for a preliminary injunction, and the 1992 congressional elections were held under the State's plan. *Ibid.* A black candidate was elected to Congress from District 4.

In December, 1993, following this Court's decision in *Shaw*, a three-judge court ruled in favor of appellees on the merits. J.S. App. 39a-109a. The court held that "[a] legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race." *Id.* at 48a. The court concluded that such an intent could be proven "*inferentially* * * * when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose." *Id.* at 50a. The court also concluded that such an intent could be shown "by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race." *Ibid.* The court found that appellees had proven racial gerrymandering in both ways. *Id.* at 51a.

Applying strict scrutiny, the court assumed that the State had one or more compelling interests in creating a second majority-black district. J.S. App. 79a. The court went on to hold, however, that the State's plan was not narrowly tailored to further those interests for two reasons. First, the court found that District 4, which was 63% black in voting age population, contained more black voters than were "reasonably necessary to give blacks a realistic chance to determine the outcome of elections there." *Id.* at 83a-84a. According to the court, black voters would have an opportunity to elect the candidate of their choice in a district that is 55% black in voting age population. *Id.* at 84a. Second, the court found that "a second black majority district could have been drawn that would have done substantially less violence to traditional redistricting principles." *Id.* at 85a.

The State appealed. While that appeal was pending, the State enacted a new redistricting plan (Act 1), with a newly configured majority-minority District 4. The Department of Justice precleared Act 1. On June 27, 1994, this Court vacated the district court's judgment and remanded the case for further proceedings in light of the new plan. J.S. App. 2a.

2. Appellees filed an amended complaint, challenging Act 1 on equal protection grounds. J.S. App. 2a. The United States intervened to defend the plan. The court held a hearing on July 21 and July 22, 1994. *Ibid.*

The evidence at trial showed that the plan was drafted by legislative aide Glenn Koepp, based on instructions he received from two state senators with leadership roles on the State Senate redistricting committee. The two state senators told Koepp to devise a plan that would respect traditional redistricting values and avoid unnecessary packing of minority voters in accordance with the district court's 1993 decision, while still attempting to create a second majority-black district. J.A. 32-35, 105-106, 109, 120-121. To accomplish those purposes, the senators suggested that Koepp model the district on congressional District 8 from prior redistricting plans. District 8 already had the second highest percentage of black voters of any district. J.A. 37, 87, 93-94, 105-106.

The State had used versions of old District 8 in every redistricting plan enacted between 1967 and 1992. J.S. App. 111a-114a. Old District 8 generally began in the western part of the State, included areas along the Red and Mississippi Rivers as it moved in a south-easterly direction, and ended beyond Baton Rouge. J.S. App. 111a-114a. Blacks are geographically concentrated in much of the area covered by the various configurations of old District 8, particularly along the Red and Mississippi Rivers. J.A. 38-39, 62, 82. In 1980, District 8 was 33.2% black; in 1990, it was 38.4% black. *Major* v. *Treen*, 574 F. Supp. at 328 n.3; J.A. 184. The area along the Red River Valley is also an important economic region and the people in that region share common interests. J.A. 71-72, 75-76, 196.

Using old District 8 as a model, Koepp devised new District 4. As Koepp explained it, "once I started working with it, * * * putting together parishes in the old Eighth, it got to be a district that was very close to a minority district." J.A. 41. And once Koepp extended the lines to Shreveport, the district was over 50% minority. *Ibid.* In devising the district, Koepp tried to keep small towns, precincts, and parishes intact, retain existing congressional districts as much as possible, reflect communities of interest, and place incumbents in separate districts. J.A. 35, 39-45, 107. To satisfy the one person, one vote rule and other objectives in the plan, 14 of Louisiana's 64 parishes were divided. J.A. 37, 45-46.

During State Senate redistricting hearings, Koepp displayed maps of various versions of old District 8 and explained that they had been used as the basis for the new majority-minority district. J.A. 37-38, 164-178. The State House also held hearings and considered two additional plans similar to the one drafted by Koepp. SX 7 (maps, H.B. 8, 11); J.A. 194. The House was advised that those plans were also based on old District 8. J.A. 201. The House and Senate made several minor adjustments in Koepp's plan in the Lafayette and St. Landry area to satisfy an incumbent's concern about the political makeup of his district and to split fewer small towns. J.A. 55, 94-96, 197, 227.

As finally enacted, the new district begins in the northwest part of the State near Shreveport, runs diagonally southeast along the Red River to Alexandria, and then further southeast along the Mississippi River past Baton Rouge. J.S. App. 110a. The district is approximately 55% black in registered voters. J.A. 41.

In recent years, the cultural regions of Louisiana have become much less distinct and agricultural regions have become widely dispersed. J.A. 69-70. The adopted plan recognizes the State's geographic, economic, and cultural regions as well or better than any of the alternative plans considered by the legislature, including those with only one majority-minority district. J.A. 74-75, 84.

Voting in Louisiana is racially polarized, and blacks in Louisiana have not been elected either to Congress or the State legislature except from districts in which blacks have constituted a majority of registered voters. J.A. 65-67, 181-193. Aware of that reality, the State legislature created a second majority-minority district in order to comply with the requirements of Sections 2 and 5 of the Voting Rights Act, and to continue to remedy Louisiana's history of discrimination in voting. J.A. 41-43, 87-90, 104, 113-115, 202-219.

3. On July 22, 1994, the district court held the new plan unconstitutional. On July 25, 1994, it enjoined further use of the plan, and required 1994 and subsequent elections to be held under a plan drawn by the court. J.S. App. 24a-26a. The court's plan creates only one majority-black district; all other districts are less than 30% black in registered voters.

The district court issued an opinion explaining its decision on July 29, 1994. J.S. App. 1a-23a. The court found that "[t]he districting map of Louisiana, created under Act 1, reflects a racial gerrymander." *Id.* at 3a. The court specifically found that District 4 "cuts across historical and cultural divides, splits twelve of its fifteen parishes and divides four of the seven major cities of the State." *Ibid.* The court added that "[t]he statistical evidence showing the racial composition of the districts further supports the finding that District Four is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Ibid.* (internal quotation marks omitted). That evidence, the court concluded, shifted the burden to the State to show that District 4 did not reflect a racial gerrymander. *Ibid.*

The court then found that the State had failed to satisfy that burden. J.S. App. 4a-5a. The court found that the State's assertion that the residents along the Red River had common interests was a "*post hoc* rationalization." The court also found that the State's claim that it had relied on the design of old District 8 was "mere pretext." *Id.* at 5a. In reaching those conclusions, the court relied in large part on the fact that "[t]he Senators themselves admitted that race played a large if not dominant role in the map as it is now drawn." *Id.* at 4a. The court also noted that old District 8 had never been challenged and that it was originally created for the purpose of ensuring the reelection of an incumbent congressman. *Id.* at 5a. The court concluded that while "other factors" affected the way in which District 4 was drawn, the *"fundamental factor driving Act 1 was race." Ibid.*

The court then held that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." J.S. App. 5a. The court noted that this Court had applied a more deferential standard to race-conscious redistricting in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977) *(UJO)*. J.S. App. 5a. The court concluded, however, that *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989), undermined the holding in *UJO*, and required strict scrutiny of all race-conscious redistricting. J.S. App. 6a.

The court went on to hold that the State had not proven that its consideration of race was supported by a compelling interest. J.S. App. 6a-7a. The court concluded that Section 5 "cannot be read to compel the results of Act 1" because there was no showing "that [the] failure to create a second majority-minority district would either be a retrogression of minority strength or have an illegal purpose." J.S. App. 8a. The court further concluded that a second majority-minority district was not compelled by Section 2 because proof of a "numerous and compact minority" is a precondition for a Section 2 dilution claim and "[t]he evidence convincingly proves that the State cannot clear [that] hurdle." J.S. App. 8a. Finally, the district court rejected the State's assertion that the creation of a majority-minority district furthered the State's interest in remedying its history of racial discrimination. *Id.* at 9a-10a. The court concluded that "[w]ithout concrete evidence of the lingering effects of past discrimination * * * we cannot agree that the re-segregation of Louisiana by racially configured voting districts is warranted." *Id.* at 10a.

The court then addressed the question of remedy. It stated that it had adopted its own plan because of the need for prompt action and because the State had already failed twice to adopt a constitutionally acceptable plan. J.S. App. 10a.

Chief Judge Shaw issued a separate opinion in which Judge Wiener concurred. That opinion generally tracked the court's reasoning. J.S. App. 13a-23a.

On August 11, 1994, this Court stayed the district court order, permitting the 1994 congressional elections to proceed under the State's plan. On December 9, 1994, the district court reentered its judgment to cure a technical deficiency. On December 12, 1994, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

I. A. The district court's holding that all race-conscious redistricting is suspect is inconsistent with *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977). In that case, five Justices agreed that the intentional creation of majority-minority districts is constitutional absent proof that the State's redistricting plan has the purpose and effect of diluting a racial group's voting strength. In *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), the Court held that race-conscious redistricting is suspect in those rare cases when the shape of a district is so highly irregular that it can be understood only as an effort to segregate the races for voting purposes. The Court in *Shaw* did not overrule *UJO*, but distinguished it on the ground that the plan at issue in *UJO* followed traditional districting practices. *UJO* therefore remains controlling when a State intentionally creates majority-minority districts that are consistent with its traditional districting practices.

UJO is correct and should not be overruled. The district court's holding that all race-conscious redistricting is suspect deprives racial minorities who share common interests of the same opportunity to influence redistricting decisions that is accorded to other groups. It conflicts with the Court's holdings that plaintiffs challenging a decision on equal protection grounds must demonstrate a discriminatory effect. It fails to give sufficient weight to Congress's judgment that jurisdictions must be conscious of the racial consequences of their redistricting decisions. And it ignores the reality that those who redistrict are race-conscious because race often correlates with voting behavior.

B. A redistricting plan is suspect under *Shaw* only if it departs dramatically from the State's traditional districting practices. For that reason, the most salient fact in this case is that District 4 in the State's plan resembles District 8 in the plans that the State used between 1967 and 1992.

The district court erred in concluding that the State's admission that it intended to create a majority-minority district undermined the State's reliance on old District 8. The inquiry under *Shaw* is an objective one into whether the district is highly irregular when compared to districts drawn according to the State's traditional districting practices. Even if the State's intent were the ultimate issue, however, the State's admission that it intended to create a majority-minority district is not inconsistent with the State's assertion that it also took into account the traditional districting values that would be served by creating a district that resembled prior districts. There is nothing suspect about that kind of balanced approach.

Isolated segments of District 4 are irregular in shape. The relevant inquiry, however, is whether the district as a whole is bizarre, not whether isolated segments of it are. District 4 reflects a con-scientious effort to create a majority-minority district while simultaneously pursuing other traditional Louisiana redistricting interests. It is therefore not suspect under *Shaw*.

II. In any event, the State's plan satisfies strict scrutiny because it is narrowly tailored to further the State's compelling interest in complying with the Voting Rights Act and ameliorating the present effects of racially polarized voting.

A. To establish a compelling interest in creating a majority-minority district in order to comply with the Voting Rights Act, the State was not required to prove that the Voting Rights Act ultimately mandated such a district. Rather, it was sufficient for the State to show that it had a sound basis for concluding that its failure to create a second majority-minority district would have led to a prima facie case against it under the Act. *City of Richmond* v. *J.A. Croson Co.,* 488 U.S. 469, 500 (1989).

A State clearly has a sound basis for creating a majority-minority district to comply with Section 2 when (1) the minority group is sufficiently large and compact to constitute a majority in a district; (2) the minority group is politically cohesive; (3) whites usually vote sufficiently as a bloc to defeat the minority's preferred candidates; and (4) the failure to create a majority-minority district would leave the minority group substantially underrepresented when compared with the group's percentage in the population. *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986); *Johnson*

v. *DeGrandy*, 114 S. Ct. 2647, 2658-2662 (1994). The State made each of those showings.

The district court found that blacks in the State are not sufficiently compact to constitute a majority in a second district. The relevant inquiry, however, is whether the proposed majority-minority district is reasonably compact in light of the State's traditional practices. Since District 4 is similar in compactness to districts drawn by the State in the same general area, the compactness requirement was satisfied.

The State also had a sound basis for believing that it would have difficulty satisfying its burden under Section 5 of showing that the failure to create a second majority-minority district was free of discriminatory purpose. In addition to the factors already discussed, the Attorney General had objected on discriminatory purpose grounds to a redistricting plan for the State Board of Elementary and Secondary Education, which had included one majority-minority district out of eight. The district court questioned the validity of that objection. Since there was no evidence that the objection was clearly insupportable, however, the State could properly rely on it.

The State also had a compelling interest in ameliorating the effect that racially polarized voting continues to have on the opportunity of minority voters to elect a candidate of their choice. Faced with the kind of extreme and pervasive bloc voting present in Louisiana, the State could properly seek to insure a fair allocation of political power.

B. The State's plan is narrowly tailored. It creates the number of majority-minority districts that its interests in complying with the Voting Rights Act and fairly allocating political power justify. It does not needlessly pack minority voters into the majority-minority districts. And it gives sufficient weight to other redistricting interests.

ARGUMENT

I. LOUISIANA'S REDISTRICTING PLAN IS NOT SUBJECT TO STRICT SCRUTINY

A. Race-Conscious Redistricting Is Not Always Subject To Strict Scrutiny

In enacting its congressional redistricting plan, the State intended to create a second majority-minority district. The district court viewed that intent alone as a sufficient basis for subjecting Act 1 to strict scrutiny. The court's core holding was that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." J.S. App. 5a.

That holding is inconsistent with *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977). In *UJO*, the State "deliberately used race in a purposeful manner" to create majority-minority districts. *Id.* at 165. Seven of the eight Justices participating voted to uphold the State's plan without subjecting it to strict scrutiny. Five Justices specifically agreed that the intentional creation of majority-minority districts does not give rise to an equal protection claim, absent proof that it has the intent and effect of diluting the majority's voting strength. See *ibid.* (White, J. joined by Stevens, J. and Rehnquist, J.); *id.* at 179-180 (Stewart, J., concurring, joined by Powell, J.). Because the plan at issue in *UJO* was consistent with traditional redistricting principles, *id.* at 168, *UJO* did not resolve the question of what constitutional standard would apply to plans that departed from such principles in order to create majority-minority districts.

In *Shaw*, this Court addressed that issue, holding that a redistricting plan that is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting" is subject to strict scrutiny. 113 S. Ct. at 2824. Such a plan is constitutional only if it is narrowly tailored to further a compelling interest. *Id.* at 2825. The Court "express[ed] no view as to whether 'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim." *Id.* at 2828. The Court did not, however, purport to overrule *UJO*. Instead, it distinguished *UJO* on the ground that the State in that case had "adhered to traditional districting principles." *Id.* at 2829. The Court also explicitly and repeatedly limited its holding to those "rare" cases in which districts are so highly irregular that they can be understood only in racial terms. *Id.* at 2824, 2825, 2826, 2828, 2830. The district court's holding in this case that Louisiana's intent to create a majority-minority district automatically triggered strict scrutiny is therefore in conflict with *UJO* and not supported by *Shaw*.

The Court's holding in *UJO* is correct and should not be overruled. That is true for several reasons. First, a holding that all race-conscious districting is automatically suspect would be inconsistent with the central purpose of the Equal Protection Clause—to insure equal treatment regardless of race. In most contexts, the principle of equal treatment is fully effectuated by considering each person as an individual, without regard to his or her race. *Metro Broadcasting* v. *FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J. dissenting). Redistricting, however, presents a different situation.

In adopting redistricting plans, States do not treat people as individuals, but as members of groups. Redistricting "inevitably has and is intended to have substantial political consequences." *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973). Because of those political consequences, groups with distinctive political interests seek to influence the way in which district lines are drawn. The groups participating in the redistricting process include not only political parties, groups with the same business interests, groups made up of people with similar socio-economic status, and issue-oriented groups, but also racial, ethnic, and religious groups. In redistricting, a State inevitably seeks to "reconcile the competing claims of [those] groups." *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).

Under the Equal Protection Clause, a State must be free to give the same consideration to the claims of racial minority groups that seek to influence redistricting as to the claims of any other interest group. For example, if, as the district court indicated, a State may properly seek to accommodate the political interests of North Louisiana Irish, mainline Protestants, South Louisiana Catholics, and Creoles (J.S. App. 17a), it must have the same freedom to accommodate the political interests of blacks who live along the Red and Mississippi Rivers. If all race-conscious redistricting were subject to strict scrutiny, however, racial minority groups sharing common interests would have less opportunity to influence redistricting than other groups. That result cannot be squared with the central purpose of the Equal Protection Clause. As Justice Stevens has stated, "[i]f it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the

Equal Protection Clause." *Shaw*, 113 S. Ct. at 2844-2845 (Stevens, J., dissenting).

The holding in *Shaw* is not at odds with that conclusion. The showing required in *Shaw* to invoke strict scrutiny—that a majority-minority district is so highly irregular on its face that it can be understood only as an effort to segregate the races for voting purposes—indicates that the State has taken action on behalf of a racial minority group that it is unwilling to take on behalf of any other group. That sort of preference for racial interests triggers special equal protection concerns. When a State follows traditional districting practices in creating a majority-minority district, however, no such special concerns are raised.

The district court's holding that all race-conscious redistricting triggers strict scrutiny is also inconsistent with this Court's holdings that a plaintiff challenging a decision under the Equal Protection Clause must show that the decision has discriminatory consequences. *Davis* v. *Bandemer*, 478 U.S. at 127 (plurality opinion); *id.* at 161 (Powell, J., concurring in part and dissenting in part); *Hunter* v. *Underwood*, 471 U.S. 222, 227 (1985); *Palmer* v. *Thompson*, 403 U.S. 217, 224-225 (1971). *Shaw* did not eliminate that requirement. Instead, the Court there identified two race-based injuries that it believed could be traced to a plan that is so highly irregular that it can be understood only as an effort to segregate the races for voting purposes. The Court concluded that such a plan imposes harm because it conveys the message "that members of the same racial group—regardless of their age, education, economic status, or the community in which the[y] live—think alike, share the same political interests, and will prefer the same candidates at the polls." 113 S. Ct. at 2827. And the Court concluded that such a plan also inflicts harm because "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Ibid.*

Whether or not the Court was right in attributing those consequences to the creation of highly irregular districts (see 113 S. Ct. at 2848 n.9 (Souter, J., dissenting)), the Court did not suggest in *Shaw* that such effects would occur when the creation of a majority-minority district is consistent with traditional districting practices. To the contrary, the premise of *Shaw* is that "race-conscious redistricting that 'segregates' by drawing odd-shaped lines is qualitatively different from race-conscious redistricting that affects groups in some other way." *Id.* at 2838 (White, J., dissenting). As commentators have noted, the harms identified by *Shaw* flow from the fact that highly irregular majority-minority districts may convey the message to the public that race has submerged all other redistricting values—a message that is not conveyed by more regular majority-minority districts. Pildes & Niemi, *Expressive Harms, "Bizarre Districts," And Voting Rights: Evaluating Election-District Appearances After* Shaw *v.* Reno, 92 Mich. L. Rev. 483, 526 (1993); See also, Alenikoff & Issacharoff, *Race And Redistricting: Drawing Constitutional Lines After* Shaw *v.* Reno, 92 Mich. L. Rev. 588, 613-614 (1993) (extremely irregular majority-minority districts may be racially divisive in a way that more compact majority-minority districts are not).

Treating all race-conscious redistricting as automatically suspect also gives insufficient weight to Congress's judgment that States should be conscious of the racial consequences of their redistricting decisions. Section 5 of the Voting Rights Act compels covered jurisdictions, like Louisiana, to create majority-minority districts when that is necessary in order to avoid retrogression in minority voting strength or when the failure to draw such a district would reflect purposeful racial discrimination. *Beer* v. *United States*, 425 U.S. 130, 140-142 (1976); *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975). Similarly, Section 2 of the Voting Rights Act requires all state and local jurisdictions to draw majority-minority districts if the failure to do so would lead to discriminatory "results." 42 U.S.C. 1973(a); *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). To view the intentional drawing of majority-minority districts as suspect in all circumstances would ignore this legal context in which redistricting authorities must operate and would undermine Congress's decision to require such districts where necessary to avoid discriminatory results.

Such a rule would also place States in a legal straitjacket in which they would face litigation with minority voters if they do not create a majority-minority district and litigation from others if they do. The result would be the functional equivalent of a requirement that States and localities must preclear all their redistricting plans in federal court before they can safely implement them. It is one thing to put States in that position in the relatively rare circumstances in which they contemplate drawing highly irregularly-shaped majority-minority districts. It is another thing to create that dilemma every time a State or locality contemplates creating a majority-minority district.

Finally, as this Court noted in *Shaw*, "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." 113 S. Ct. at 2826. Because experience shows that race is often highly correlated with voting behavior, it is unrealistic to expect legislators to ignore that reality when they engage in the highly political task of redistricting. *Id.* at 2835 (White, J., dissenting) ("[I]t can hardly be doubted that legislators routinely engage in the business of making electoral predictions based on group characteristics—racial, ethnic, and the like."); *id.* at 2844 (Stevens, J., dissenting) ("Politicians have always relied on assumptions that people in particular groups are likely to vote in a particular way when they draw new district lines."). Thus, if legislators are candid in their discussions concerning redistricting plans, a holding that all race-conscious redistricting is automatically suspect would subject a very large number of redistricting plans at all levels of government to strict scrutiny. Cf. *Washington* v. *Davis*, 426 U.S. 229, 248 (1976) (noting that the consequence of treating all state laws with a discriminatory effect as suspect would be to raise serious questions about, and perhaps invalidate, a wide range of state laws).

In sum, the State's intent to create a second majority-minority district did not trigger strict scrutiny in this case. The district court erred in holding otherwise.

B. District 4 Is Not So Highly Irregular On Its Face That It Can Be Understood Only As An Effort To Segregate The Races For Purposes Of Voting

The district court also subjected the State's plan to strict scrutiny on the ground that District 4 was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." J.S. App. 3a. The court erred in reaching that conclusion as well.

1. The question whether a district is so highly irregular on its face that it can be understood only as an effort to segregate the races for purposes of voting is not a purely factual issue that a court can decide based entirely on intuition or aesthetic reactions. That inquiry must be guided by meaningful legal standards. Four principles are particularly important here.

First, the manner in which the State has drawn and continues to draw other districts is the most appropriate benchmark for determining whether a particular majority-minority district is "bizarre." See *Cane* v. *Worcester County, Maryland*, 35 F.3d 921, 927 n.6 (4th Cir. 1994), petition for cert. pending (No. 94-955); cf. *Jeffers* v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), aff'd mem., 498 U.S. 1019 (1991). As previously discussed, a State should have the same leeway to accommodate the interests of racial minority groups with common interests as it has to accommodate other interest groups. For that reason, only majority-minority districts that are much more unusual in shape than districts drawn by the State to accommodate other political interests trigger strict scrutiny. Moreover, as previously noted, the Court in *Shaw* concluded that a district is suspect when it conveys a message that excessive consideration has been given to race. That perception will be shaped by how the State ordinarily redistricts, not by some model redistricting ideal. Practical considerations also necessitate reliance on the State's own redistricting standards. The only alternative to that approach would be a wholly subjective "I know it when I see it" test.

Second, *Shaw* described suspect districts as "extremely irregular" and "bizarre." 113 S. Ct. at 2824-

2825. Districts that are only "somewhat irregular" are not suspect. *Id.* at 2826. A district is therefore suspect under *Shaw* only if it departs dramatically from the State's traditional redistricting practices.

Third, *Shaw* held that a district is suspect only when it is so extremely irregular "on its face" that it can be understood only in racial terms. 113 S. Ct. at 2824. The terms "on its face" clearly mandate an objective inquiry into the nature of the district, not a subjective inquiry into the legislature's intent. *Johnson* v. *Miller*, 864 F. Supp. 1354, 1395 & n.2 (S.D. Ga. 1994) (Edmondson, J., dissenting), probable jurisdiction noted, Nos. 94-631, 94-797, 94-929; see also Pildes & Niemi, *supra*, 92 Mich. L. Rev. at 508.

Finally, the relevant inquiry under *Shaw* is whether the *district* is bizarre. The fact that isolated segments of a district are irregular does not make the district itself bizarre. *Vera* v. *Richards*, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994), appeal docketed (No. 94-988).

2. Application of these legal standards leads to the conclusion that District 4 should not have been subjected to strict scrutiny. The most salient fact in this case is that District 4 resembles a majority-white district used in previous State redistricting plans. For 25 years (from 1967-1992), District 8 usually began in the western part of the State, included areas along the Red and Mississippi Rivers as it moved southeast, and ended beyond Baton Rouge. J.S. App. 111a-114a. District 4 includes the same general area. *Id.* at 110a. District 4 most closely resembles District 8 in the congressional plans used in 1967-1970 and 1971-1972. *Id.* at 112a, 113a. Because District 4 is consistent with the State's redistricting traditions, it is not suspect under *Shaw*.

In addition, the population along the Red River Valley which is included in District 4 shares common social and economic interests. That evidence reinforces the conclusion that District 4 is not so irrational on its face that it can be understood only in racial terms.

Isolated segments of District 4 are irregular. But as we have discussed, the relevant inquiry under *Shaw* is whether the district as a whole is bizarre, not whether isolated segments of it are. When viewed as a whole, District 4 is not such a dramatically irregular departure from State districting practices as to make it suspect under *Shaw*.

3. The district court rejected the State's reliance on the fact that District 4 resembles old District 8 and encompasses a community of interest along the Red and Mississippi Rivers as "*post hoc* rationalization" and "mere pretext." J.S. App. 5a. In reaching those conclusions, the court relied in large part on the admissions of state legislators that race played a large role in the drawing of District 4. *Ibid.* As we have noted, however, *Shaw* mandates an objective inquiry into whether a district conveys the impression that racial considerations have been pursued to the exclusion of other redistricting values, not a subjective inquiry into the legislature's intent. The resemblance of District 4 to old District 8 and the presence of a community of interest along the Red and Mississippi Rivers are powerful objective indications that District 4 would not be understood as being driven by racial considerations to the exclusion of other redistricting values. Those factors are therefore of critical relevance in evaluating appellees' *Shaw* claim. Conversely, the fact that state legislators conceded that the State intended to draw a majority-minority district is not determinative of a *Shaw* claim. Under *Shaw*, there is nothing suspect about a State's desire to draw a majority-minority district.

Even if the legislature's actual intent were the relevant subject of inquiry, the district court misunderstood what the State sought to prove by introducing evidence that it modelled District 4 on District 8 and that it included persons in District 4 who had common interests other than their race. The point of that evidence was not to show that race played no role in the drawing of District 4; it admittedly played an important one. Rather, the point was to show that the State was attempting to draw a majority-minority district in a way that was consistent with other traditional redistricting interests. The State's acknowledgement that it intended to create a majority-minority district is not in any way inconsistent with its assertion that it also took into account the traditional districting values of using districts that resemble prior districts and including persons with common interests. That acknowledgement therefore provides no basis for the court's finding that the State's reliance on those other factors was pretextual.

In rejecting the State's reliance on old District 8, the district court also attributed significance to the fact that District 8 was "never challenged" and "was crafted for the purpose of ensuring the reelection of Congressman Gillis Long." J.S. App. 5a. Legislation that has not been challenged, however, is presumptively constitutional. *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1156-1157 (1993). Nor does it denigrate the State's reliance on old District 8 to note that the district was originally drawn to protect an incumbent congressman. To the contrary, that fact indicates that the shape of District 8 reflects the State's traditional districting practices. The district court therefore erred in failing to treat that district as a benchmark for determining whether District 4 reflected such a dramatic departure from the

State's traditional practices as to be suspect under *Shaw.*

4. The district court made only a conclusory finding that District 4 was bizarre. J.S. App. 3a. Chief Judge Shaw, joined by Judge Weiner, elaborated on why, in their opinion, District 4 should be viewed as bizarre. J.S. App. 15a-17a. Their reasons are unpersuasive.

Chief Judge Shaw first found that District 4 is not compact because it is 250 miles long and spans 14 parishes. J.S. App. 15a-16a. Other districts in the current State plan, however, are also long and span numerous parishes. District 6 is about 200 miles long and spans 18 parishes; District 5 is about 190 miles long and spans 17 parishes; and District 3 is about 175 miles long and spans 15 parishes. J.S. App. 110a. In the court's plan (J.S. App. 38a), District 4 is about 200 miles long and spans 12 parishes, and District 3 is about 175 miles long and spans 13 parishes. See also U.S. Exh. 4 (District 5 in 1969-70 plan contained 17 parishes; District 5 in 1971-1972 plan contained 19 parishes; District 5 in 1973-1982 plan contained 20 parishes). Because Louisiana is comparatively large and has 64 parishes, but only seven congressional districts, some of its districts will necessarily be long and contain numerous parishes. There is nothing bizarre or even unusual about that.

Judge Shaw next found that District 4 does not respect political subdivisions because it splits 12 parishes and four cities. J.S. App. 16a-17a. In Louisiana, however, parish and city lines have never been sacrosanct in congressional redistricting. The three plans used between 1971 and 1992 all divided seven parishes. U.S. Exhs. 4, 6; PX 5, J.S. App. 65a. The court's own plan divided six. Congressional redistricting plans throughout the twentieth century have split the city of New Orleans. The number of parishes and cities split by

District 4 does not constitute such an extraordinary departure from the State's usual redistricting practices as to trigger strict scrutiny.

Chief Judge Shaw also found that the State's plan did not follow the traditional principle of respect for commonality of interests because District 4 combines different ethnic, religious, and agricultural groups. J.S. App. 15a, 17a. Any plan with only seven districts in a State as diverse as Louisiana, however, must combine different groups in districts to some extent. As already noted, District 4 unites a large number of residents who share common economic and social interests. The State's decision to give greater weight to the commonalities of interest reflected in District 4 than to the ethnic, religious, and agricultural factors favored by Judge Shaw does not show that District 4 is bizarre.

In sum, suspect treatment is reserved for truly bizarre districts that, on their face, evidence a single-minded pursuit of racial goals, with little or no consideration for other districting values. District 4 is not such a district. It reflects an acknowledged effort to create a majority-minority district, while simultaneously pursuing other traditional Louisiana districting values. It is therefore not suspect under *Shaw*.

II. THE STATE'S REDISTRICTING PLAN SATISFIES STRICT SCRUTINY

Even if the district court were right in subjecting the State's plan to strict scrutiny, it erred in concluding that strict scrutiny was not satisfied. The State's plan is narrowly tailored to further the State's compelling interests in complying with the Voting Rights Act and ameliorating the effect that racial polarization has on the opportunity of minority voters to elect candidates of their choice.

A. The State Had Compelling Interests In Creating a Second Majority-Minority District

1. A State has a compelling interest in complying with Sections 2 and 5 of the Voting Rights Act. See *Shaw*, 113 S. Ct. at 2830. The district court did not suggest otherwise. Instead, it held that, for the State to invoke that compelling interest as a justification for its actions, there must be "findings of * * * statutory violations." J.S. App. 7a. The district court therefore reviewed the evidence *de novo* to determine whether the State's creation of District 4 was "compelled" by Section 2 or Section 5. J.S. App. 7a, 9a. Based on the application of that standard, the court found that the creation of District 4 was not justified by the need to comply with Section 2 or Section 5. J.S. App. 7a-9a.

The district court's approach is inconsistent with this Court's precedents. To invoke the Voting Rights Act as a justification for its actions, the State was not required to prove that the Act ultimately required the drawing of a second majority-minority district. Rather, the State was required to show only that it had a "strong basis in evidence" for its actions—a standard that is satisfied if the State had a sound basis for believing that its failure to draw a second majority-minority district would have led to a prima facie case against it. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); *id.* at 292-293 (O'Connor, J., concurring); *Johnson* v. *Transportation Agency*, 480 U.S. 616, 652-653 (1987) (O'Connor, J., concurring in the judgment). That standard gives States a margin of safety that will encourage their voluntary compliance with the Voting Rights Act, while still insuring that States do not resort to race-based action casually or gratuitously. *Johnson*, 480 U.S. at 652-653 (O'Connor, J., concurring in the judgment); *Wygant*, 476 U.S. at 290-291 (O'Connor, J., concurring). The actual violation standard adopted by the district court imposes an unfair burden of omniscience upon the States. *Shaw* v. *Hunt*, 861 F. Supp. 408, 439-440 n.26 (E.D.N.C. 1994). Under the correct standard, Louisiana's creation of a second majority-minority was justified by both Section 2 and Section 5.

a. In *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), the Court established three preconditions for a Section 2 vote dilution claim. Plaintiffs must show that (1) the minority population is sufficiently large and compact to constitute a majority in a single-member district, (2) the minority group is politically cohesive, and (3) whites usually vote sufficiently as a bloc to defeat the minority's preferred candidate. In *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2658-2662 (1994), the Court further held that the extent to which the minority population has an opportunity to elect candidates in proportion to their percentage in the population is important evidence bearing on the ultimate issue whether a redistricting plan violates Section 2. 114 S. Ct. at 2664 (O'Connor, J., concurring) ("[A] court must always consider the relationship between the number of majority-minority voting districts and the minority group's share of the population."). In light of *Gingles* and *DeGrandy*, a State would clearly have a reasonable basis for creating a majority-minority district to comply with Section 2 when the State legitimately believes that each of the three *Gingles* preconditions could be established against it and when, without such a district, the minority group remains substantially underrepresented when compared to the group's proportion of the population. See *Shaw* v. *Hunt*, 861 F. Supp. at 440-441 & n.28.[1]

The State made that showing here. There is overwhelming evidence that blacks are politically cohesive in Louisiana and that whites usually vote sufficiently as a bloc to defeat their preferred candidates. No black candidate has ever won election to Congress or the Louisiana legislature except from a district in which blacks have constituted a voting majority. In the five most recent primary and run-off elections in old District 8, more than 87% of the blacks, on average, supported the black candidate, while less than 10% of the whites, on average, supported that candidate. SX 15. In addition, since blacks constitute 30% of the State's population, creating only one majority-minority district out of seven (14%) would leave the minority population very substantially underrepresented when compared to that group's share of the population.

That leaves only the question whether the minority population is sufficiently large and compact to constitute a majority in a district. The district court found that no compact district could be drawn because the minority population outside New Orleans is too dispersed. J.S. App. 8a & n.4. The *Gingles* compactness requirement, however, does not demand compactness in any absolute sense. Rather, the question in circumstances like those presented here is whether the proposed majority-minority district is reasonably compact in light of a State's traditional districting practices. *Jeffers* v. *Clinton*, 730 F. Supp. at 207; *Cane* v. *Worcester County*,

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[1] In some circumstances, even when a State's existing plan provides proportional representation, the State may need to create an additional majority-minority district in order to comply with section 2. See *DeGrandy*, 114 S. Ct. at 7658-7676.

35 F.3d at 926-927 n.6. As already noted, District 4 (54% black) is similar in compactness to previous districts drawn by the State in the same geographic area. *Gingles* requires no more.[2]

Moreover, the question here is not whether plaintiffs bringing a Section 2 suit would necessarily have been successful in satisfying the compactness requirement, but whether the State could have legitimately believed that they would be. Given the similarity in compactness between District 4 and old District 8, the State acted reasonably in seeking to comply with Section 2.

b. The State also had a sound basis for concluding that the creation of a second majority-minority district was necessary to comply with Section 5. Section 5 forbids a jurisdiction from implementing a redistricting plan unless it can show that the plan has neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. 1973c. Thus, even when a redistricting plan is not retrogressive, a State cannot obtain preclearance unless it makes the further showing that the plan is free of discriminatory purpose. *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 469, 471 & n.11 (1987); *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982); *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975).

In this case, the State reasonably concluded that it would be unable to satisfy its burden under Section 5 to show that a redistricting plan with only one majority-minority district was free of discriminatory purpose.

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[2] According to the district court, the State's expert "confirmed" that the minority population outside New Orleans was too dispersed to satisfy the compactness requirement. J.S. App. 8a n.4. In fact, however, the State's expert testified that District 4 was reasonably compact. J.A. 127.

The State could not ignore the fact that a three-judge court had found that the State's 1982 redistricting plan diluted black voting strength. *Major* v. *Treen, supra.* The State also knew that Louisiana voting remained racially polarized to an extraordinary degree. SX 15. And the State had previously drawn majority-white districts similar in shape and location to District 4. Those facts reasonably led the State to conclude that it would have difficulty showing that a failure to draw a second majority-minority district similar to District 4 was based on legitimate redistricting considerations rather than an intent to dilute the black vote.

The State could also take into account the fact that the Attorney General had already objected to its redistricting plan for the statewide Board of Elementary and Secondary Education (B.E.S.E.), a plan that had included only one majority-minority district out of eight. The Attorney General's objection letter stated that the State's B.E.S.E. plan had fragmented minority concentrations among three majority white districts, that this fragmentation had not been justified in terms of neutral districting principles, and that the application of such neutral principles would have resulted in two majority-minority districts. See DX 16 (1993 Hearing).

The district court apparently believed that the State could not rely on the existence of the Attorney General's objection to its B.E.S.E. plan, but was required to show that the objection was a legally valid one. J.S. App. 7a & n.3. That approach was incorrect. Congress has delegated to the Attorney General primary responsibility for evaluating whether state redistricting schemes in jurisdictions covered by Section 5 violate the voting rights of racial minorities. A State always has the option to seek preclearance in the District Court for the District of Columbia if the Attorney General determines that the State's plan is discriminatory. But Congress clearly contemplated that the States would not always have to take that step before revising their plans to accommodate the Attorney General's objection. The whole point of permitting the States to seek administrative preclearance was to provide an expeditious alternative to district court preclearance actions. *McCain* v. *Lybrand*, 465 U.S. 236, 246-247 (1984). That benefit would be lost if the States could not generally rely on the Attorney General's "administrative finding" of discrimination. *Regents of the Univ. of Calif.* v. *Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.) (Section 5 objection by the Attorney General is sufficient to give a state a compelling interest in taking race-based remedial action).

Moreover, Congress determined that substantive Section 5 determinations would be made by either the Attorney General or the District Court for the District of Columbia. *McCain* v. *Lybrand*, 465 U.S. at 246-247. Congress assigned local federal courts a limited procedural role in the Section 5 enforcement scheme—to enjoin voting changes that have not been precleared. *Allen* v. *State Board of Elections*, 393 U.S. 544, 558-560 (1969). As the Court explained in *Perkins* v. *Mathews*, 400 U.S. 379, 385 (1971), "What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.'" The effect of the district court's approach in this case is to transfer substantive Section 5 review from the Attorney General and the District Court for the District of Columbia to local federal district courts in contravention of Congress's intent.

Because a State has its own responsibilities under the Equal Protection Clause, it may not defer entirely to the Attorney General's Section 5 analysis. Given the Attorney General's important role in the Section 5 statutory scheme, however, a State should be able to act on the assumption that the Attorney General has correctly objected to its plan, unless the objection is clearly insupportable. *Shaw* v. *Hunt*, 861 F. Supp. at 443 & n.34; see *UJO*, 430 U.S. at 175 (Brennan, J., concurring in part) (the Attorney General's judgment that a particular districting scheme complies with the remedial objectives of the Voting Rights Act is entitled to "considerable deference"); cf. *Presley* v. *Etowah County Comm'n*, 112 S. Ct. 820, 831 (1992) (a court must defer to the Attorney General's construction of Section 5, unless Congress has clearly expressed a contrary intent or the Attorney General's construction is unreasonable).

In this case, appellees have identified no such shortcoming in the Attorney General's B.E.S.E. objection. That objection, together with the evidence discussed above, reasonably led the State to conclude that its failure to create a second majority-minority district would be found to violate Section 5.

2. Independent of its obligations under the Voting Rights Act, the State also had a compelling interest in ameliorating the effect that racially polarized voting has on the opportunity for minority voters in Louisiana to elect the candidates of their choice. In *UJO*, Justices White, Rehnquist and Stevens stated that a State is not "powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls." 430 U.S. at 167. Where such discrimina-

tion exists, a State may seek to achieve a "fair allocation of political power between white and nonwhite voters." *Ibid.* No other Justices in *UJO* addressed that issue. The analysis of the three Justices, however, is fully consistent with this Court's decision in *Croson*, which recognized that a State has a compelling interest in remedying identified discrimination within its jurisdiction, even when it has no federal statutory duty to do so. 488 U.S. at 491-493, 509. The approach of the three Justices in *UJO* should therefore be followed here.

Applying that analysis leads to the conclusion that polarized voting in Louisiana gives the State a compelling interest in creating a second majority-minority district. As we have noted, racially polarized voting in Louisiana is persistent and extreme. Based on the evidence before it, the State had every reason to believe that unless it created an additional district in which blacks constituted a majority, bloc voting by whites would preclude minority voters from having any realistic chance to elect a second representative of their choice and would leave them substantially under-represented compared to their percentage of the population. In those circumstances, the State had a compelling interest in creating a second majority-minority district in order to achieve a fair allocation of political power between white and nonwhite voters.

B. The State's Plan Is Narrowly Tailored To Further Its Compelling Interests

The district court's opinion does not address the issue of narrow tailoring. District 4, however, easily satisfies narrow tailoring standards.

Relying on *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion), courts have focused on three narrow tailoring requirements in the redistricting context. First, a State may not create more majority-minority districts than either the Voting Rights Act or the State's interest in fairly allocating political power justify. *Shaw* v. *Hunt*, 861 F. Supp. at 446; J.S. App. 82a. Second, a State may not needlessly pack substantially more minority voters into a district than are reasonably necessary to give the minority group an opportunity to elect the candidate of its choice. *Ibid.* And third, a State may not create an extremely irregular district when a far more regular district would be equally effective in serving the State's compelling interest and the creation of the more compact district would not compromise the State's other legitimate redistricting interests.[3] J.S. App. 84a-87a.

The State's plan in this case does not run afoul of any of those requirements. The plan creates the number of majority-minority districts justified by the State's interests in complying with the Voting Rights Act and fairly allocating political power. Nor does the plan needlessly pack minority voters into District 4. Blacks constitute 55% of the registered voters in the district, very close to the minimum percentage necessary to provide minority voters with an opportunity to elect a candidate of their choice. J.S. App. 83a-84a. And for the reasons already discussed, the location and shape of District 4 is fully consistent with the State's traditional districting practices.[4]

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[3] As explained in our jurisdictional statement (at 11-14) in *United States* v. *Vera*, No. 94-988, the narrow tailoring principle does not require a State to draw the most compact district possible. A State may legitimately give priority to redistricting interests other than compactness, such as protecting incumbents.

[4] The State contends that the district court erred in imposing a permanent redistricting plan, without first giving the State a chance to propose a remedial plan. We agree. The court justified

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted.

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its decision to adopt its own plan on the ground that prompt action was needed and the State had already failed to adopt a constitutionally acceptable plan twice. J.S. App. 10a. Those factors might well have justified the court's decision to impose an interim plan for the upcoming elections. There was no justification, however, for the court's decision to impose a *permanent* plan without first affording the State a chance to propose its own plan. *Wise* v. *Lipscomb*, 437 U.S. 535, 539 (1978).

(11)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES,
Appellant,
v.
RAY HAYS, *et al.*,
Appellees,

STATE OF LOUISIANA, *et al.*,
Appellants,
v.
RAY HAYS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

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QUESTIONS PRESENTED

1. Whether Louisiana's intentional segregation of voters by race in redistricting is subject to strict scrutiny.

2. Whether (1) Louisiana's mistaken belief that federal law required segregated congressional districts, or (2) an amorphous invocation of past discrimination, can serve as a compelling interest justifying such districts.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 94-558 and 94-627

UNITED STATES,

Appellant,

v.

RAY HAYS, *et al.*,

Appellees.

STATE OF LOUISIANA, *et al.*,

Appellants,

v.

RAY HAYS, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

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BRIEF FOR APPELLEES RAY HAYS, EDWARD ADAMS, SUSAN SHAW SINGLETON AND GARY STOKLEY

"In the eyes of the Constitution, a man is a man. He is not a white man. He is not an Indian. He is not a Negro." *Anderson v. Martin*, 206 F. Supp. 700, 705 (D. La. 1962) (Wisdom, J., dissenting), *rev'd* 375 U.S. 399 (1964). Louisiana violated that principle in *Anderson* by requiring the designation of a candidate's race on the ballot, thus placing the State's "power and prestige behind a policy of racial classification inconsistent with the elective processes." *Id.*

Judge Wisdom condemned that law by invoking the first Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), and noting that "[i]f there is *one area above all others* where the Constitution is color-blind, it is the area of state action with respect to the *ballot and the voting booth*." 206 F. Supp. at 705 (emphasis added).

The Louisiana law at issue here is unconstitutional for the same reason. Because State-sponsored racial classification "is inherently discriminatory and violative of the Equal Protection Clause," *Dorsey v. State Athletic Comm'n*, 168 F. Supp. 149, 151 (E.D. La. 1958) (Wisdom, J.), *aff'd mem.* 359 U.S. 533 (1959), Louisiana's attempt to "sculp[t] voting districts along racial lines" is no more permissible than would be an attempt to divide citizens by race "at schools and lunch counters." *Hays II*, U.S. J.S. App. ("U.S. App.") at 11a-12a. The district court's judgment invalidating Act 1 should therefore be affirmed.

STATEMENT OF THE CASE

Following this Court's decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), the three-judge court below twice invalidated legislation segregating Louisiana's voters by race to achieve two predominantly black congressional districts and five overwhelmingly white ones. Both decisions involved redistricting plans prepared in response to the 1990 census, which reduced Louisiana's congressional delegation from eight to seven seats. The first decision invalidated Act 42, which contained the notorious Z-shaped District 4 (the so-called "Zorro" district), which "[t]he State now concedes . . . was bizarre." *Hays II*, U.S. App. at 3a n.1. The Louisiana legislature responded by passing Act 1, which the district court again invalidated and which is at issue here.

A. Appellees' Challenge to Louisiana's Redistricting Plans.

Appellee Ray Hays grew up in Grambling, Lincoln Parish, site of the historically-black university of the same name established in 1901. Since childhood, Hays has had many friends in the community associated with Grambling University and in nearby Ruston and surrounding rural areas. Since the early 1970s, he has been more or less continuously involved in grass-roots organizing and campaigning for Democratic Party candidates. As a local party official, he has strived for an integrated electorate, campaigning for both black and white candidates among voters of both races. These efforts greatly benefitted from the original thrust of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973 *et seq.*, which abolished the discriminatory voting practices and procedures that had characterized Louisiana politics during the Jim Crow era.

This litigation began when Hays and a multi-racial group of plaintiffs from Lincoln Parish became concerned that the VRA had devolved into the engine of a divisive racial spoils system. During the 1991 redistricting for the Louisiana legislature and the eight-member Board of Elementary and Secondary Education ("BESE"), the VRA was invoked to maximize the number of majority-minority districts at all levels of state government. In May 1992, "a legislative alliance between the Black and the Republican Caucuses" again implemented a race-based approach to redistricting in response to Louisiana's loss of one seat in the United States House of Representatives. *Hays I*, U.S. App. at 77a n.54. The alliance of forces responsible for Act 42 never denied the controlling role of race; to the contrary, they championed race as the primary *justification* for the plan. *Id.* at 75a-76a.

Opposing Act 42 as a cynical effort at racial engineering, plaintiffs filed suit in June 1992, challenging the plan on constitutional and statutory grounds. *See Hays I*, U.S. App. at 42a. Joining Hays as plaintiffs were Ed Adams, a retired school principal and grandson of the founder of Grambling University; Gary Stokley, a tenured sociology professor at Louisiana Tech University in Ruston and a Democratic Party activist; and Susan Singleton, a working mother who recently had become involved in Democratic Party politics.

A three-judge panel of Louisiana federal judges, Circuit Judge Jacques L. Wiener, Jr. (from Shreveport), and District Judges John M. Shaw and Donald E. Walter (from Lafayette and Shreveport respectively), convened to hear the case. The court held a two-day evidentiary hearing in August 1992, during which experts and legislators testified on both sides. *Id.* 74a-76a. The court denied plaintiffs' request for a preliminary injunction and allowed the 1992 congressional elections to proceed as planned under Act 42—including the "Zorro" District. *Id.* at 42a. The district court took plaintiffs' case on the merits under advisement until this Court rendered its judgment in *Shaw*, whereupon the court conducted a second two-day hearing in August 1993. On December 28, 1993, the court held that Act 42 was a racial gerrymander invalid under the Fourteenth Amendment. *Hays I*, U.S. App. 39a.

The district court opinion invalidating Act 42 relied principally on *Shaw* and this Court's earlier decisions in *Wright v. Rockefeller*, 376 U.S. 52 (1964), and *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). *See Hays I*, U.S. App. at 48a n.12; 49a n.17; 69a nn.45 & 46. Specifically, the court held that "a legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race." *Id.* at 48a.[1]

The court explained that the element of intent essential to a Fourteenth Amendment claim could be proven either circumstantially, as by a district's bizarre shape as in *Shaw*, or "*a fortiori* . . . by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race." *Id.* at 50a. According to the court, evidence relevant to establishing an unconstitutional racial gerrymander includes: (1) the shape of district boundaries; (2) the extent to which district boundaries reflect established political subdivisions, and the values of compactness and contiguity; (3) the extent to which parishes and cities are split along racial lines; and (4) testimony admitting a specific legislative intent to classify citizens by race. *Id.* at 62a-75a.

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[1] Emphasis in original here and elsewhere unless otherwise indicated.

The court acknowledged at the outset that "[r]ace will never be literally the only factor" determining district lines. Rather, as the court noted, the proper inquiry is whether race was "important" or a "motivating" factor. *See Hays I*, U.S. App. at 69a-70a & n.46 (citing *Arlington Heights*, 429 U.S. at 265). When assessing whether discriminatory intent exists, the court "as fact finder . . . must determine the credibility of witnesses, weigh the evidence, and choose between [the competing] inferences." *Id.* at 73a.

After nearly four days of evidentiary hearings, the court concluded that the Zorro District in Act 42 was "highly irregular." U.S. App. at 62a. That district, the court found, violated traditional districting principles and split parishes and cities along self-evidently racial lines. *Id.* at 63a-66a. Testimony by witnesses from both sides, moreover, left "absolutely no doubt that the immediate *intent* of the Legislature as a whole was to enact a plan containing two black majority districts, essentially without regard to any other considerations and interests." *Id.* at 77a. The court thus concluded that "the facts and inferences overwhelmingly favor the Plaintiffs," and that Act 42 "is undeniably a child of racial gerrymandering." *Id.* at 73a.

The court then proceeded to reject Louisiana's argument that Act 42 was narrowly tailored to comply with the Voting Rights Act. Having found that "[n]o one could claim that District 4 is compact, at least not with a straight face," the court nonetheless assumed, "[f]or the sake of judicial economy," that Act 42 was justified by compelling governmental interests. *Id.* at 65a, 79a. Regardless of the state's interests, however, neither Act 42 nor District 4 could be described as "narrowly tailored, either relatively or absolutely." *Id.* at 87a. The Voting Rights Act did not justify the plan: "because Louisiana lost a seat in the United States House of Representatives, a plan with one black majority district would satisfy the Section 5 nonretrogression requirement given no more dramatic shift in the statewide ratio of white-to-black voters than is demonstrated by a comparison of the 1980 and 1990 census figures." *Id.* at 82a n.64.

In addition to finding Act 42 non-compact, the court also found that "the evidence supported an average, *net* white cross-over vote in non-judicial elections of between 10% and 25%"—*i.e.*, "black candidates will gain more votes from white cross-over voters (whites voting for black candidates) than they will lose from black cross-over voters (blacks voting for white candidates)." *Hays I*, *id.* at 83a-84a & n.65.

B. Act 1 Replaces Act 42.

While the Louisiana Attorney General appealed the district court's invalidation of Act 42 to this Court, the State convened a special legislative session to prepare a new redistricting plan. Again, racial considerations were overt. Many legislators "remain[ed] convinced that the Department of Justice would not pre-clear any plan that did not contain two majority/minority districts"—a belief that the Department "encouraged, if not demanded." *Hays II*, U.S. App. at 7a n.3. The Department's professed interest in stage-managing the legislative debate in Baton Rouge, of course, only encouraged those eager to pour Act 42's old wine into a new bottle.

The tacit alliance between the proponents of Act 42 and the Justice Department was very much in evidence during the special legislative session. On April 18, 1994, the districting committees of both chambers of the Louisiana legislature met to consider alternative plans, some with two majority-minority districts and some with only one. *See, e.g.*, SB8, HB6 (two districts); SB6, HB5 (one district), from Apps. D, E of Mot.

for Prelim. Inj. On April 19, the Senate passed a bill similar to the final Act 1. *Official Journal of the Senate of the State of Louisiana*, April 19, 1994, at 14. On the same day, the House considered a bill that had a single majority-minority district (centered in New Orleans), and defeated a bill similar to the one passed in the Senate. *Official Journal of the House of Representatives of the State of Louisiana*, April 19, 1994, at 3-5.

On April 20, with the two chambers deadlocked, Justice Department officials chose to intervene—albeit indirectly—through a letter of questionable authority to the counsel for the Legislative Black Caucus. Mot. to Affirm at 10 n.6. That letter, signed by the Honorable Deval L. Patrick, Assistant Attorney General for the Civil Rights Division, began by noting that "the Louisiana legislature is now in a special session . . . to consider the enactment of a new congressional redistricting plan." J.A. 229. The letter then proceeded to set forth an interpretation of VRA Section 5 and to apply the criteria in *Gingles* without addressing the court's findings in *Hays I* regarding non-compactness and the existence of a substantial net white cross-over vote. U.S. App. at 64a-65a 83a-84a & n.65. The letter closed by opining that "it remains reasonable to conclude that the Voting Rights Act requires the state to devise a congressional redistricting plan with two black-majority districts." J.A. 231.

Immediately upon circulation of the Patrick letter, the Louisiana House reversed course. On the very next day, April 21, it reconsidered and defeated by a 54-50 vote the previously-considered bill creating a single majority-minority district. *Official Journal of the House of Representatives of the State of Louisiana*, April 21, 1994, at 1-3. The House then reconsidered and passed by a comfortable (61-43) margin the originally-defeated bill with two majority-minority districts. *Id.* at 3. On April 22, the Senate approved the House-passed bill (which modified slightly the Senate's original bill) despite an attempted filibuster. *Official Journal of the Senate of the*

State of Louisiana, April 22, 1994, at 3-4. Shortly thereafter, Governor Edwin W. Edwards signed Act 1 into law.

C. The Court's Findings That Act 1 Constitutes an Unconstitutional Racial Gerrymander.

After Act 1 became law, this Court dismissed as moot Louisiana's appeal relating to Act 42. 114 S. Ct. 2731 (June 27, 1994). On July 6, 1994, plaintiffs filed an amended complaint, accompanied by voluminous statistical data on Act 1's seven Districts. These data included racial breakdowns and maps of Act 1's many split parishes and cities, plus historical data and additional maps of previous Louisiana districting plans. *See* PX 3, 4, 5; Ex. A, Tab 7, Mot. for Prelim. Inj. The court handled the case on an expedited basis so that the state could finalize its plans in August for the upcoming 1994 congressional elections.

The district court determined at the outset that plaintiffs' new evidence, coupled with the irregular shape of Act 1's new District 4, once again raised "the inference that the Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly." *Hays II*, U.S. App. at 3a. The court then offered Louisiana and the Justice Department the opportunity to rebut plaintiffs' *prima facie* case at yet another two-day trial—the third in the case—held on July 26 and 27, 1994.

Once again, Louisiana was unable to rebut the inference that it had intentionally classified its citizens by race, or to justify that classification. Apart from a perfunctory effort at explaining Act 1's boundaries on race-neutral grounds, the State's own witnesses frankly conceded that race had been the motivating factor behind the new redistricting plan. "The Senators themselves admitted that race played a large if not dominant role in the map as it is now drawn," the court explained, and "[t]hose persons involved directly with the formation of Act 1 acknowledged that the creation of a second majority-minority district was the specific intent of the Legislature." *Hays II*, U.S. App. at 4a.

The court nonetheless looked beyond these admissions, holding that "Act (1) speaks for itself" on the intentional separation of the races. *Id.* at 3a. Appellants failed to rebut the inference of intentional racial classification arising from the "bizarre and irregular shape of District Four . . . [which] cuts across historical and cultural divides, splits twelve of its fifteen parishes and divides four of the seven major cities of the State." *Id.* at 3a. The plan's lack of respect for established political subdivisions convinced the court that Act 1 was "at best a cosmetic makeover" of the ill-fated Act 42. *Id.* at 3a n.1. The new District 4 contained even *fewer* whole parishes than did its predecessor in Act 42 (three instead of four), and split nearly the same percentage of its parishes (80% instead of 86%). *Compare Hays II*, U.S. App. at 3a *with Hays I, id.* at 65a.

The court also found that Act 1's bizarre shape, both overall and along the boundaries splitting parishes and cities, represented a marked departure from Louisiana's traditional districting practices. The court noted that Act 1's District 4 "is approximately 250 miles long, . . . making it considerably longer than any other district in the State." *Hays II*, U.S. App. at 16a. Marked by irregular lines, it "points fingers out into Caddo, Rapides, and Lafayette Parishes, while taking small bites out of St. Martin and Iberville Parishes." *Id.* The same Rorschach appendages that characterized Act 42 reappeared in the maps of parishes and cities in Act 1. *See* App. 1a-4a (cities); Mot. to Affirm at 9a, 12a, 16a-18a (parishes).

While these and other departures from traditional districting principles alone triggered strict scrutiny, further proof that Act 1 "intentionally segregates citizens into voting districts based on their race," *Hays I*, U.S. App. at 48a, emerged from the "statistical evidence showing the racial composition" of the split parishes and cities. *Id.* at 3a. These data revealed that the legislature *consistently* divided parishes by placing most *black* registered voters (more than 82% of blacks in split parishes) in District 4, while placing most *white* voters (nearly 77% of whites in split parishes) in the neighboring predominantly white Districts (3, 5, 6, and 7).[2] Registered white voters from these 12 split parishes who were shunted into the adjacent white districts outnumbered registered black voters from the same areas by more than ten to one (about 348,000 to 34,000).

An equally dramatic racial segregation of voters occurred in Louisiana's major cities. Thus, "in its efforts to capture sufficient pockets of African-American voters," the new District 4 "spli[t] four of the State's largest cities, outside of New Orleans—Shreveport, Baton Rouge, Lafayette, and Alexandria." *Hays II*, U.S. App. at 16a-17a. The legislature could not have created a second black-majority district otherwise since nearly 58% of the black citizens (53% of the black registered voters) in District 4 resided in these four cities. In each city, areas with large black majorities (73% to 80%) were placed into District 4 while areas with even larger white majorities (83% to 88%) were placed into in Districts 5, 6 and 7. *See* J.A. at 228. In the split cities, *thirteen times* more registered white voters than their black counterparts ended up outside of District 4 (about 155,000 to 12,000).

The division of these cities in Act 1, as in Act 42, "destroy[ed] the common representation historically enjoyed by residents of the same municipality." *Hays I*, U.S. App. at 66a. Moreover, these cities comprised "four separate and major media centers," thereby forcing congressional candidates "to spend substantial amounts of money and time" above what would be required if city boundaries had been respected. *Hays II*, *id.* at 169 n.2.

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[2] All demographic statistics cited in this brief are derived from the parish and city demographic data in PX4 and SX4. Split-parish registered voter data are available in tabular form in the Motion to Affirm at 1a-3a; split-city total population and registered voter data are available in similar form at J.A. 228. All references to racial percentages refer to total population unless the text specifies registered voter data. The calculations are based on District 4's total population of 603,000 and black population of 58.4%.

In light of these facts, the court readily found that the State's ham-handed attempt to deny the obvious role of race in drawing Act 1 was simply not credible. The State put forward two race-neutral explanations for its plan: (1) a geographer "testified that District 4 was drawn along the Red River Valley demonstrating a commonality of interest," and (2) witnesses claimed "that District 4 of the plan was modeled after the old eighth district in Louisiana." *Id.* at 17a-18a. But the court dismissed these explanations, finding that "[t]he Red River valley theory is clearly a *post hoc* rationalization similar to the Mississippi River theory offered to support Act 42 and equally unbelievable." Similarly, the court found that "[t]he State's purported reliance on District Four's similarity to the 'old Eighth' is mere pretext." *Id.* at 4a-5a. Considering the whole record, the court found that "Act 1 can only be explained credibly as the product of race-conscious decisionmaking," and that "[a]lthough the witnesses highlighted other factors that carved the contours of the awkward district, the *fundamental factor driving Act 1 was race.*" *Id.*

D. Louisiana's Failure to Provide a Compelling State Interest.

The court's determination that race was the "fundamental factor driving Act 1" triggered strict scrutiny, thereby requiring Louisiana to show that Act 1 is "narrowly tailored to further a compelling governmental interest." *Shaw*, 113 S. Ct. at 2832. As compelling governmental interests, Louisiana "contend[ed] that [1] incumbency politics, [2] the Voting Rights Act, and [3] remedying past legal and social or continuing social discrimination justified the racial segregation of voters." *Hays II*, U.S. App. at 7a. The latter two explicitly race-based justifications, of course, belied the State's primary claim that Act 1 was *not* motivated by race.

The court noted "at the outset that incumbency politics cannot justify racial classifications." *Id.* The court acknowledged, however, that "[a]dhering to federal anti-discrimination laws and remedying past or continuing discrimination could constitute compelling governmental interests—*if* the State could 'demonstrate a strong basis in evidence for its conclusion that remedial action was necessary.'" *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion)) (emphasis added). Ultimately, the court found that Louisiana had presented no such strong basis in evidence. *Id.* at 6a-7a.

The court accepted at face value the contention that "[t]he State Legislature believed that the Voting Rights Act compelled the creation of a second majority-minority district" and agreed that the United States Attorney General's "threat [to withhold pre-clearance under VRA Section 5], whether issued by her or some middle level bureaucrat, was a matter of real concern to the State." *Id.* at 7a n.3. While acknowledging that "[l]itigation in the District of Columbia, and everywhere else is expensive," the court concluded that this "*real* concern is not a *compelling* one." *Id.* (emphasis added).

The court found, however, that "[n]either the State nor the Department of Justice offered any evidence suggesting that failure to create a second majority-minority district would either be a retrogression of minority strength or have an illegal purpose or effect." *Id.* at 8a, 19a (Shaw, C.J., concurring). The court also rejected the State's Section 2 defense. After reciting the "three conditions to a Section 2 'dilution' claim" set forth by this Court in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), the court found that "[t]he evidence convincingly proves that the State cannot clear the first *Gingles* hurdle"—compactness. U.S. App. at 8a. Specifically, "[d]espite a minority population of approximately 30%, demographic distribution is simply too diffuse to generate a majority voting age population in any district outside of the Orleans Parish region." *Id.* at 8a n.4.

Finally, the court dismissed Louisiana's contention that Act 1 was otherwise necessary to remedy past or present discrimination. Both the majority and concurring opinions acknowledged the "sordid history of unconstitutional treatment of black citizens in Louisiana" that remains "indelibly imprinted in our memories." *Hays II*, U.S. App. at 9a-10a, 20a-21a. Nonetheless, the court concluded that permitting the mere invocation of that history to justify Act 1 would "herald the demise of equal protection." *Id.* at 10a. "Without concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies, we cannot agree that the re-segregation of Louisiana by racially configured voting districts is warranted." *Id.* In short, the district court invalidated Act 1 because "defendants utterly failed to demonstrate how gerrymandering could remedy the problems asserted as compelling interests." *Id.* at 10a & n.6.

SUMMARY OF ARGUMENT

This case is not about the topology of unusually-shaped districts, but about the authority of a State to classify its citizens by race. In redistricting, as with other forms of state action, intentional racial classification triggers strict scrutiny.

Recognizing that Act 1 must fail under traditional Fourteenth Amendment analysis, appellants endeavor first to avoid strict scrutiny altogether and then to dilute its traditional rigor. They argue variously that this Court's decisions, the Fourteenth Amendment itself, and the Voting Rights Act exempt redistricting from strict scrutiny and that racial gerrymanders are no different than run-of-the-mill political gerrymanders. Moreover, even if the traditional equal protection analysis applies, they argue, the test must be what the State "reasonably" or "legitimately" *believed* the Voting Rights Act required, not what the Act *actually* required. Appellants' attempts to avoid strict scrutiny altogether and to dilute its traditional rigor are neither legally nor factually sound.

I. A. Not so many years ago, a respected commentator treated as self-evident the proposition that for government to classify citizens by race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."

Alexander M. Bickel, *The Morality of Consent* 133 (1975). But today, the Solicitor General not only admits that race played the overriding role in Act 1; he trumpets that role, seeking a blanket redistricting exemption from strict scrutiny to allow the Justice Department to continue its racial engineering under the cloak of the VRA. This Court in *Shaw*, however, already rejected the Solicitor General's argument that race-based redistricting "does not give rise to an equal protection claim, absent proof that it has the intent and effect of diluting the majority's voting strength." U.S. Br. at 14. And neither the Fourteenth Amendment nor the Voting Rights Act, properly construed, enshrine *group* rights over *individual* rights, or carve out an exemption from strict scrutiny for intentional racial classification in redistricting.

B. *Shaw* thus stands in the mainstream of this Court's equal protection jurisprudence. While Act 1's bizarre District 4 fails even the Solicitor General's purely aesthetic test, it is Louisiana's intentional classification of its voters by race—not the shape of District 4 *per se*—that is constitutionally proscribed. After three separate trials, the court found that Louisiana had violated traditional districting principles by splitting parishes and cites along racial lines and that the "*fundamental factor driving Act 1 was race*." *Hays II*, U.S. App. at 3a. Appellants have not shown that these findings were clearly erroneous. Nor have they demonstrated that the court erred in dismissing Louisiana's "old Eighth" justification in light of evidence that District 4 was built by selecting black voters and excluding white voters from prior versions of the "old Eighth" district and then adding two heavily black areas that *never* were part of *any* of the former versions of the "old Eighth." Pretext aside, Act 1 represents nothing less than the ascendancy of a "separate but better off" policy for both Louisiana's black *and* white citizens. *Wright v. Rockefeller*, 376 U.S. 52, 62-67 (1964) (Douglas, J., dissenting).

II. A. Appellants' efforts at diluting the rigor of strict scrutiny fare no better. Their claimed need for "some breathing room," La. Br. at 35, or a "margin of safety," U.S. Br. at 27, between what the Voting Rights Act requires and what the Constitution forbids has particularly far-reaching implications. Changing the test from what the Voting Rights Act *actually* required to what Louisiana "reasonably" or "legitimately" *believed* it required would create an unprecedented "good faith" defense in constitutional cases whenever a State claims to have been "reasonably" mistaken about the requirements of federal law. The ancient principle that ignorance of the law is no defense and this Court's unbroken practice of adjudicating constitutional violations on the merits, without regard to good intentions, both preclude any such contention. The asserted need for "breathing room" to comply with the Voting Rights Act, therefore, cannot justify the constriction of constitutionally-guaranteed rights, reversing the traditional canon that statutes are construed to avoid conflicting with the Constitution, not vice-versa.

B. The court below made findings sufficient to encompass even appellants' unprecedented "reasonable belief" theory by concluding that Louisiana "did not have a basis in law or fact to *believe* that the Voting Rights Act *required* the creation of two majority-minority districts." U.S. App. at 9a (emphasis added). Appellants offer no grounds for disturbing the lower court's conclusions concerning either Sections 5 or 2 of the Voting Rights Act, or concerning appellants' farfetched demand that the federal courts guarantee a "fair allocation of political power between white and nonwhite voters." U.S. Br. at 34; La. Br. at 38. The court below did not clearly err in finding no evidence that "the failure to create a second majority-minority district would be either a retrogression of minority [voting] strength or have an illegal purpose or effect." *Hays II*, U.S. App. at 8a-9a. The same is true of VRA Section 2. The court correctly held that Louisiana failed to show that Section 2 required a second majority-minority district since "[t]he evidence convincingly proves that the State cannot clear the first *Gingles* hurdle." *Id.* at 8a. Nor did the court err in refusing to go beyond the

Voting Rights Act to find a compelling interest, especially absent "concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures." *Id.* at 10a.

ARGUMENT

Before turning to the merits, it is appropriate to respond briefly to Louisiana's contention that plaintiffs lack Article III standing. La. Br. at 41-42 (citing *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992)). Louisiana argues that plaintiffs suffered no "injury in fact" and have identifed no "possible personal benefit they would derive from a favorable decision." *Id.* at 41. But that argument misperceives the nature of the injury alleged. Plaintiffs' alleged injury derives from "the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class." *Metro Broadcasting v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). This injury long has sufficed for Article III standing, *see, e.g., Heckler v. Mathews*, 465 U.S. 728, 739 (1984); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), regardless of the race of the person claiming standing, *see, e.g., Powers v. Ohio*, 499 U.S. 400 (1991). As the court below explained, "[w]hen voting districts are carefully planned like racial wards, an *individual* injury occurs." *Hays II*, U.S. App. at 11a. *See also Shaw*, 113 S. Ct. at 2827-28.

Nor does it matter that plaintiffs reside in District 5, not District 4. Act 1 created District 4 by classifying voters by race and placing them in District 4 or a neighboring district on that basis. Plaintiffs may not have a right to be placed into any particular district, but they *do* have a right not to be placed into or excluded from a district because of the color of their skin. *See Powers*, 499 U.S. at 409 ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."). Here, plaintiffs' goal has always been to cast their votes as part of an electorate not segregated by race; to that end, it matters not whether a particular plaintiff is white (Hays and Stokley), black (Adams) or Asian-American (Singleton). In short, plaintiffs have been harmed by being classified on the basis of their race, just like the plaintiffs challenging the "separate but equal" schools in *Brown v. Board of Education*, 347 U.S. 483 (1954).

I. ACT 1 IS SUBJECT TO STRICT SCRUTINY.

If any constitutional principle of the last half-century is firmly established, it is this: state action reflecting a suspect classification or infringing a fundamental right must be subjected to strict scrutiny. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *cf. United States v. Carolene Prod.*, 304 U.S. 144, 153 n.4 (1938). This case involves *both* the historically most suspect classification—*race*—and the most important civic right—the right to *vote*. *See, e.g.*, *Shaw*, 113 S. Ct. at 2824; *Reynolds v. Sims*, 377 U.S. 533, 535 (1964). Yet, while openly admitting that Louisiana "deliberately used race in a purposeful manner," U.S. Br. at 14; La. Br. at 14, in a context that intimately affects the fundamental right to vote, appellants steadfastly resist subjecting Act 1 to strict scrutiny.

Having set out to overturn fundamental constitutional precepts and enshrine a regime of group entitlement in redistricting, appellants find themselves without ground to stand on. They offer four arguments for insulating race-based districting from strict scrutiny: (1) this Court in *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) supposedly carved out a "redistricting" exception to the traditional Fourteenth Amendment analysis, U.S. Br. at 10, 14; (2) strict scrutiny would be "inconsistent with the central purpose of the Equal Protection Clause" because the traditional "principle of equal treatment" cannot be "fully effectuated" by "considering each person as an individual," *id.* at 15; (3) in redistricting, States "must be free to give the same consideration to the claims of racial minority groups . . . [as] any other interest group," *id.* at 16; and (4) relaxed scrutiny is appropriate in light of the "legal context" of redistricting, owing to "Congress's judgment that States should be conscious of the racial consequences of their redistricting decisions." *Id.* at 18-19.

These arguments have no basis in principle or precedent. Indeed, if applied broadly in race-discrimination cases, they would turn current jurisprudence upside down. For if only *group* results mattered, the public schools would still be segregated under a "separate but equal" regime, which by definition (at least in theory) treated "groups" the same. *But see Brown v. Board of Education*, 347 U.S. 483 (1954). Indeed, appellants' theory, if applied across the board, would mean that intentional segregation claims would fail absent proof of disparate results. *But see Loving v. Virginia*, 388 U.S. 1 (1967) (prohibition of interracial marriage); *Hamm v. Virginia Bd. of Elections*, 230 F. Supp. 156 (E.D. Va.), *aff'd mem.*, 379 U.S. 19 (1964) (segregated voting registration and tax records). The Fourteenth Amendment guarantees, not equality of *results* among *groups*, but rather equality of *treatment* for *individuals*—in redistricting as elsewhere.

A. Where Race Is a "Motivating Factor," State Action Must be Subjected to Strict Scrutiny Unless the Same Result Would Have Obtained Without Regard to Racial Considerations.

This Court's opinion in *Shaw* strongly reaffirmed that race-based redistricting is like any other form of official racial discrimination and subject to the same well-established analysis: "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an attempt to separate voters into different districts on the basis of race, and that the separation lacks sufficient jusitification." 113 S. Ct. at 2328. *Shaw* relied on a long line of cases involving racial classifications, from *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), through Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 539 (1896), to modern expressions of race neutrality in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), *Wright* v. *Rockefeller*, and *Loving v. Virginia*. These precedents underscore that classifications of citizens solely on the basis of race "'are by their very nature odious to a free people,'" *Shaw*, 113 S. Ct. at 2824 (quoting *Hirabayashi v. United States*, 320 U.S. 81 (1943)), and that even an ostensibly race-neutral statute may "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* (citing *Croson*, 488 U.S. at 493 (plurality opinion)).

As these cases recognize, "[t]he *central purpose* of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race." *Shaw*, 113 S. Ct. at 2824 (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)) (emphasis added). By noting that only those plans that "rationally *cannot be understood* as anything other than an attempt to segregate voters," 113 S. Ct at 2328 (emphasis added), *Shaw* simply reaffirmed this Court's traditional approach for resolving claims of official racial discrimination. In *Arlington Heights*, for example, the Court held that an equal protection claim exists where state action does not *facially* discriminate along racial lines if that action is "*unexplainable* on grounds other than race." *Washington*, 429 U.S. at 266 (emphasis added).

Under this traditional analysis, state action is subjected to strict scrutiny when a plaintiff establishes that race is "a motivating factor" behind the State's decision and the State fails to establish that "the same decision would have resulted even had the impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 266, 271 n.21. Thus, "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (citing *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977)).

Contrary to appellants' assertions, this Court never has suggested that redistricting cases are impervious to this traditional equal protection analysis; indeed, that traditional analysis was partially *derived from* redistricting cases. *See Arlington Heights*, 429 U.S. at 265-266 (relying on *Wright v. Rockefeller* and *Gomillion v. Lightfoot)*. The court below, like other courts reviewing redistricting plans after *Shaw*, thus properly applied the established analysis of *Arlington Heights* and subsequent cases. *See Hays I*, U.S. App. at 44a-57a; *Shaw v. Hunt*, 861 F. Supp. 408, 427-28 (E.D.N.C. 1994); *Vera v. Richards*, 861 F. Supp. 1304, 1332-33 (S.D. Tex. 1994); *Johnson v. Miller*, 864 F. Supp. 1354, 1372-73 (S.D. Ga. 1994), *prob. juris. noted*, 115 S. Ct. 713 (Jan. 6, 1995).

1. Appellants never cite *Arlington Heights, Gomillion*, or *Wright*. The reason for that omission is hardly a mystery: they seek to depict this case as no more than a *redistricting* case, not a *race* case. According to the Solicitor General, this Court in *UJO* exempted redistricting from the traditional analysis applicable to racial classifications when "[f]ive Justices specifically agreed that the intentional creation of majority-minority districts does not give rise to an equal protection claim, absent proof that it has the intent and effect of diluting the majority's voting strength." U.S. Br. at 14. Under this approach, *UJO* would establish a general rule that individual equal protection claims are not cognizable in redistricting cases except insofar as a State fails to adhere "traditional districting principles." *Id.* at 15. *Shaw* would thus stand as an exceedingly narrow (and anomalous) exception to *UJO*'s general rule.

This argument might have more force had it not been explicitly rejected by the Court in *Shaw*. The five Justices in *UJO* cited by the Solicitor General did not address equal protection claims *generally*, but rather those claims brought "under the framework the Court previously had adopted for vote-dilution cases." *Shaw*, 113 S. Ct. at 2829. *UJO* "did not purport to overrule *Gomillion* or *Wright*" nor did it limit "non-vote-dilution" equal protection claims to cases where "traditional districting principles" have been ignored. *Id.* at 2830. Rather, it preserved claims that a reapportionment plan may be "so irrational on its face that it immediately offends principles of racial equality." *Id.* at 2829.

Far from carving out an exception, therefore, *Shaw* simply applied the general rule that race-based classifications *are* subject to strict scrutiny, even in redistricting cases. 113 S. Ct. at 2830-32. While *Shaw* did not address all possible ways of *proving* such a claim, nothing in the Court's opinion suggests that the traditional analytical framework of *Arlington Heights* was rejected.

2. The Solicitor General next makes an even broader argument based explicitly on an unprecedented theory of "group rights" under the Fourteenth Amendment. Treating the intentional creation of majority-minority districts as suspect, he argues, "would be inconsistent with the central purpose of the Equal Protection Clause." U.S. Br. at 15. The usual "principle of equal treatment" for individuals thus must give way because "[r]edistricting . . . presents a different situation" in which "States do not treat people as individuals, but as members of groups." *Id.* Under this view, *Shaw* is limited to those districts "much more unusual in shape" than politics normally permits since only such "highly irregular majority-minority districts may *convey the message* to the public that race has submerged all other redistricting values." *Id.* at 18, 21 (emphasis added).

No authority is cited for this theory that only aesthetically-challenged districts "convey messages" that produce constitutional injury.[3] The injury here flows not from

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[3] One may question how often voters form their perceptions about whether the State has been even-handed by analyzing district shapes *per se*. Voters are much more likely to know when their city or parish has been split in

(continued...)

district maps *themselves*, but from the *intentional segregation* of citizens into different districts based on their race.

Nor does the Fourteenth Amendment guarantee equal results for racial or other *groups*; to the contrary, it explicitly guarantees "equal protection of the laws" to *individuals* ("any person"). To say that redistricting is a special exception where only group rights apply is to ignore—indeed, to turn upside down—Judge Wisdom's observation that "the ballot and the voting booth" is the "one area above all others where the Constitution [must be] color-blind." *Anderson v. Martin*, 206 F. Supp. at 705. Far from dismissing individual rights in this context, this Court has long recognized racial vote-dilution claims as an *extension* of *individual* rights, *see, e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 412 U.S. 755 (1973), without abandoning the "Lincoln tradition" that it is "the individual [who] is important, not his race, his creed, or his color." *Shaw*, 113 S. Ct. at 2827 (*quoting Wright*, 376 U.S. at 66 (Douglas, J., dissenting)).

The Solicitor General's group-rights theory strikes at the heart of the "Lincoln tradition." Not only redistricting, but all race-based classification can readily be deemed "*group*-based." Racial classifications offend basic constitutional values precisely *because* they treat citizens as members of groups, not as individuals. Any suggestion, therefore, that intentional racial segregation in redistricting is constitutionally *permissible* (indeed, possibly constitutionally *required*) would turn the Fourteenth Amendment on its head.

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[3] (...continued)
two, with most black voters in one district and most white voters in another. And, whether black or white, voters also are likely to be suspicious of officials who say, or imply, that they are better off when separated along racial lines. That is particularly true of persons like plaintiffs who are engaged in grass-roots political activity and who recognize immediately the diminished opportunity for coalition-building across racial lines as the electorate is divided by race.

3. Appellants nonetheless argue that a "group rights" approach here is compelled by *Davis v. Bandemer*, 478 U.S. 109 (1986). When engaged in redistricting, they contend, States invariably must "reconcile the competing claims" made by a whole range of interests including "racial, ethnic, and religious groups." U.S. Br. at 16; La. Br. at 17 (citing *Davis*, 478 U.S. at 147 (O'Connor, J., concurring in judgment)). Consequently, appellants argue contend that States must remain "free to give the same consideration to the claims of racial minority groups . . . [as] any other interest group." U.S. Br. at 16.

Davis, however, will not bear appellants' sweeping interpretation. Indeed, far from *compelling* a "group rights" approach, Justice O'Connor's opinion rejected "any group right outside the context of racial discrimination." 478 U.S. at 151. And even there, her opinion carefully noted that it is the *individual* rather than the *group* who is protected because of the "stronger nexus between individual rights and group interests" in that context. *Id.* at 151-152. *Davis* thus actually underscores that the State's ordinarily wide latitude in redistricting does *not* extend to *race*-based redistricting. Instead, racial classifications remain inherently suspect in the redistricting context because, while "[p]olitical affiliation is the keystone of the political trade . . . [r]ace, ideally, is not." *UJO*, 430 U.S. at 171 n.1 (Brennan, J., concurring); *see also Shaw*, 113 S. Ct. at 2828 ("[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, [the case law] would seem to compel the opposite conclusion.").

Shaw's reaffirmation of individual rights in redistricting, of course, does not proscribe any and all consideration of race in that context. Indeed, *Shaw* emphasized that "this Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances." 113 S. Ct. 2824. "[A] legislature always is *aware* of race when it draws district lines"; "when members of a racial group live together in a community," a plan taking that into account "may reflect wholly legitimate purposes." *Id.* at 2826. Members of one race *can* but do not *necessarily* form a cohesive and compact community. As *Shaw* emphasized, while race may be a legitimate consideration in helping to determine the *boundaries* of a particular community, the Constitution emphatically rejects the notion that the races *per se* constitute different communities:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.

113 S. Ct. at 2827.

The presence of concentrated black (or white) populations, therefore, may be relevant just like the "traditional north-south, ethno-religious, economic and historical distinctions in Louisiana." U.S. App. at 17a. (Shaw, C.J., concurring). But States may not make a suspect classification the touchstone for an electoral district—for example, if Louisiana were deliberately to set out to create a predominantly Roman Catholic district.

Kiryas Joel Village School District v. Grumet, 114 S. Ct. 2481 (1994), although decided under the Religion Clauses of the First Amendment, is instructive on this point. The Satmar Hasidic sect of Judaism incorporated the Village of Kiryas Joel under a general New York law permitting "almost any group of residents" to form their own municipal government. *Id.* at 2485. But the special legislation that created the Kiryas Joel School District was, by the very fact that it applied only to the village of Kiryas Joel, considered to have been "purposely drawn to separate Satmars from non-Satmars." *Id.* 2494. It was the State's action in endorsing this pre-existing religious division that violated the First Amendment. *Id.* at 2504 (Kennedy, J., concurring in the judgment). Were New York to "allow *all* villages to operate their own school districts"—and thus remove religion as the force driving the legislative classification—state support for educating Kiryas Joel's handicapped students would have been constitutionally permissible. *Id.* at 2498 (O'Connor, J., concurring in part).

Kiryas Joel and traditional Fourteenth Amendment cases like *Arlington Heights* and *Hunter v. Underwood* thus answer Louisiana's hyberbolic claim that "[a] blanket application of strict scrutiny [to redistricting would] render presumptively unconstitutional countless white-majority districts as well as black majority districts." La. Br. at 16. Most districts nationwide comprised of a majority of one race simply reflect existing communities, and were not "motivated" by race. Thus, under *Shaw*, strict scrutiny is the exception, not the rule—just as it has proven to be the exception, not the rule in jury-selection cases. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986); *Hernandez v. New York*, 500 U.S. 352 (1991). Most post-*Shaw* decisions, thus, have applied strict scrutiny only to a *single* district, not to *all* districts.[4]

4. Appellants finally argue that applying traditional equal protection analysis to redistricting would "give []insufficient weight to Congress's judgment that States should be conscious of the racial consequences of their redistricting

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[4] In three of the four cases applying strict scrutiny, the test was applied to only one district. *Hays; Shaw v. Hunt*, 861 F. Supp. 408,427-28 (E.D.N.C. 1994); *Johnson v. Miller*, 864 F. Supp. 1354, 1372-73 (S.D. Ga. 1994), *prob. juris. noted*, 115 S. Ct. 713 (Jan. 6, 1995). Even in Texas, only three of that State's thirty districts were subjected to strict scrutiny. *Vera v. Richards*, 861 F. Supp. 1304, 1332-33 (S.D. Tex. 1994).

decisions." U.S. Br. at 18-19. The Voting Rights Act, they suggest, sets the "legal context" in which such state action is to be evaluated. Applying strict scrutiny to race-based redistricting, on this view, would "place States in a legal straightjacket," or make "compliance with a valid act of Congress immediately . . . suspect under the Fourteenth Amendment." *Id.* at 19; La. Br. at 18. But no penumbra emanating from the Voting Rights Act, or any other federal legislation, can be invoked to justify state discrimination on the basis of race.

It is misleading to conflate *Congress'* authority to remedy perceived racial discrimination (power expressly *conferred* by Section 5 of the Fourteenth Amendment) with *state* authority to impose race-based classifications (power expressly *withdrawn* by the Fourteenth Amendment). *See, e.g.*, *Metro Broadcasting*, 497 U.S. at 565-566; *UJO*, 430 U.S. at 169 (Brennan, J., concurring). As this Court only recently emphasized in *Shaw*, the VRA does not give States "*carte blanche* to engage in racial gerrymandering." *Shaw*, 113 S. Ct. at 2831 (emphasis added). When a State classifies its citizens by race, only the most "searching judicial inquiry" is appropriate because otherwise "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Shaw*, 113 S. Ct. at 2824 (quoting *Croson*, 488 U.S. at 493 (plurality opinion)).

B. The District Court Properly Determined That Act 1 Triggered Strict Scrutiny.

Even if appellants' reading of *Shaw* were correct and the traditional Fourteenth Amendment analysis did not apply in redistricting, this case would still call for strict scrutiny. The Solicitor General suggests that the constitutional violation at issue in *Shaw* and here is based entirely on a district's *shape*. Under this view, four considerations are relevant in identifying a district that triggers strict scrutiny: (1) the district must be visually bizarre—"much more unusual in shape than districts drawn by the State to accommodate other political interests"; (2) it must be "extremely irregular" (as opposed to "somewhat irregular"), *i.e.*, it must "depar[t] dramatically from the State's traditional redistricting practices"; (3) the district must be irregular "on its face," *i.e.*, without regard to "a subjective inquiry into the legislature's intent"; and (4) it is the district as a whole—and not "isolated segments"—that must be bizarre. U.S. Br. at 21-22. Louisiana suggests a similar "map only" test. La. Br. at 19-20.

Appellants never explain precisely what constitutional principles underlie these tests nor how they would work in practice. Their wholly-aesthetic approach, indeed, would apparently exclude previously-relevant considerations such as statistical data on the racial composition underlying district lines, *see, e.g., Gomillion*, 364 U.S. at 341; *Wright*, 376 U.S. at 54-55, as well as "frank concession[s]" of a specific intent to segregate voters by race under a "separate but better off" theory. *Wright*, 376 U.S. at 61-62 (Douglas J., dissenting). Appellants' fixation on district topology also appears to contradict this Court's observation in *Shaw* that a claim can be based on evidence that "a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles," including "respect for political subdivisions," 113 S. Ct. at 2827—a determination that often requires consideration of facts besides a district's shape.[5]

The closest appellants come to addressing these contradictions is the Solicitor General's statement that "*Shaw* mandates an objective inquiry into whether a district conveys the impression that racial considerations have been pursued to the exclusion of other redistricting values, not a subjective inquiry into the legislature's intent." U.S. Br. at 23. Yet the court below undertook *precisely* such an objective inquiry. If the court had deemed "[t]he State's acknowledgement that it intended to create a majority-minority district," *id.* at 24, to be dispositive in and of itself, the three evidentiary hearings and the extensive discussion of facts in court's two opinions would have been entirely superfluous.

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[5] For example, it may be that none of the districts depicted in the maps appended to Louisiana's brief would require strict scrutiny under appellants' reading of *Shaw*. La. Br. at 26 n.31. But this is true only because Louisiana has provided sparse demographic data; whether these districts conform to the State's historic districting practices is not apparent from the maps themselves. *Id.*

The district court's comprehensive inquiry led it to conclude that the "bizarre and irregular shape of District Four raised an inference Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly"—an inference confirmed by "[t]he statistical evidence showing the racial composition of the districts." U.S. App. at 3a. Under *Gingles*, such determinations are "particularly dependent upon the facts of each case," and call for "an intensely local appraisal" benefitting from the "trial court's particular familiarity with the indigenous political reality." 478 U.S. at 78-79. The court below did not clearly err either in appraising plaintiffs' *prima facie* case, or in finding that appellants failed to rebut it.

1. Plaintiffs Established A *Prima Facie* Case That Racial Considerations Were The "Motivating Factor" Behind Act 1.

Contrary to appellants' assertion, plaintiffs did not carry their burden below "merely [by] the presentation of a map depicting the congressional district boundaries." La. Br. at 40 n.47.[6] Rather, plaintiffs showed, among other things, that

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[6] Plaintiffs presented the following types of evidence before the trial on Act 1: (1) maps of congressional districts in Louisiana since 1963 (PX 3); (2) statistical evidence showing the racial composition of each of Act 1's seven districts and of each of its many split parishes and cities (PX 4); (3)

(continued...)

Act 1's District 4 divided twelve of its fifteen parishes— the most "fundamental unit[s] of societal organization in the history of Louisiana." *Hays I,* U.S. App. at 65a. District 4's twelve split parishes constituted: (1) *three times* more split parishes (previous maximum—four) than any single previous congressional district; *see* PX 3; USX 8 Table 1; and (2) almost *twice* as many split parishes (previous maximum—seven) as any *entire congressional districting plan* in Louisiana history. U.S. Br. 25. While the United States may not consider this "an extraordinary departure from the State's usual redistricting practices," U.S. Br. at 26, the court below did not clearly err in deciding otherwise. *Hays II*, U.S. App. at 3a.

Appellants insist that "parish . . . lines have never been sacrosanct in congressional redistricting" and that Louisiana has "split parishes and cities for a variety of purposes." U.S. Br. at 25; La. Br. at 27-28. But "the statistical evidence showing the racial composition of the districts," *Hays II*, U.S. App. at 3a, plainly reveals why *these* particular parishes were split. *Without exception*, each time the boundary of District 4 split a parish, blacks fell disproportionately into District 4, and whites disproportionately into neighboring districts. *See* Mot. to Affirm at 1a-3a. This parish-splitting often assumed *Gomillion*-like proportions. In Iberville Parish, for example, an uncouth multi-sided figure fences all but 59 of that parish's more than 9000 black registered voters into District 4. *Id.* at 3a, 18a.

The role that race played in dividing the District 4's cities is even more blatant. Of the *seventeen* cities and towns divided by Act 1, *fourteen* were strung along District 4's borders. J.A. 228. *Without exception*, each of these fourteen split municipalities placed predominantly black areas into

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[6] (...continued)
maps of the split cities (PX 5); (4) maps of the split parishes (App. A, Mot. for Prelim. Inj.); (5) the record of the Act 1 legislative proceedings (App. B-E, to Mot. for Prelim. Inj.); and (6) the full record from the two previous evidentiary hearings.

District 4; Districts 3, 5, 6 and 7 absorbed the remaining white neighborhoods. *Id.* Only 22 of the 1756 voters in District 4 from the town of New Roads (in Pointe Couple Parish) are white, but voters from the same town placed in District 6 are almost 89% white (1510 white compared to 193 black).

The same four geographically-dispersed, major cities that anchored the "Zorro" district in Act 42—Alexandria, Baton Rouge, Lafayette and Shreveport—again provided the lion's share (nearly 58%) of District 4's black population. Three of these cities—Alexandria, Lafayette and Shreveport—had *never* been split in any previous congressional redistricting plan. PX 3. In each of these four cities, the neighborhoods assigned to District 4 were overwhelmingly (73-80%) black, while the nearby areas placed in Districts 5, 6, and 7 were overwhelmingly (83-88%) white. *See* J.A. at 228.[7] Again, the Solicitor General may not believe that these facts reveal "an extraordinary departure from the State's usual redistricting practices," U.S. Br. at 25-26, but the court below did not clearly err in finding otherwise. *Hays II*, U.S. App. at 3a.

2. Appellants Failed to Rebut Plaintiffs' *Prima Facie* Case.

The departures from Louisiana's traditional districting principles described above established a *prima facie* case of racial discrimination (even under the Solicitor General's test), which appellants failed to rebut at trial. *Hays II*, U.S. App. at 3a. Far from providing a credible race-neutral justification for District 4's boundaries, appellants' evidence only confirmed that race controlled Act 1's creation.

Appellants continue to maintain that the (supposed) resemblance of District 4 to prior configurations of Louisiana's

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[7] And as the city maps of Shreveport and Alexandria reveal, App. 1a, 4a, the shadow cast by racial gerrymandering along the boundaries of these cities again flouted the requirement of contiguity. See *Hays I*, U.S. App. 64a-65a ("Such tokenism mocks the traditional criterion of contiguity.").

Eighth congressional district is "[t]he most salient fact in this case." U.S. Br. at 22; La. Br. at 21-23. But there can be no doubt on this record that from start to finish, District 4 was based on race. The State's witness, Mr. Koepp, "was asked to look at the old Eighth District" because it had "the highest minority population district in the state other than the minority district number two." 7/21/94 Trial Vol. 2 at 11. From that point on, parishes and parish parts were added or subtracted, always with the apparent aim of blackening District 4 and whitening adjacent districts.

The end result departed dramatically from any of the many versions of the "old Eighth." No previous configuration of the "old Eighth" ever split more than four parishes; District 4 split twelve. *See* PX3. Likewise, no version of the "old Eighth" ever included fewer than twelve *full* parishes; District 4 included only three. *Id.* The notion that District 4 bears any meaningful resemblance to the "old Eighth" falls apart entirely upon consideration of District 4's constituent building blocks.[8]

At one time or another, 23 of Louisiana's 64 parishes were included in one or more versions of the "old Eighth." *See* maps at PX3. Only five whole parishes—Rapides, Avoyelles, Pointe Coupe, West Baton Rouge, and Iberville—were *always* included entirely within the "old Eighth." If District 4 truly were intended to resemble the "old Eighth," then surely it would have retained these five core parishes. But in fact, it retained only one: West Baton Rouge. Another parish, Avoyelles (72% white) was excluded altogether. The remaining three parishes were only partially included, with their populations predictably divided along stark racial lines. The portions of these three parishes included in District 4 are majority-black, while the excluded portions are 86% white.

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[8] The Solicitor General asserts that District 4 "most closely resembles District 8 in the congressional plans used in 1967-70 and 1971-72." U.S. Br. at 22. But six entire parishes included in those versions of the "old Eighth" appear nowhere in District 4. Those parishes and their respective white populations are as follows: Avoyelles (72%), Allen (77%), Beauregard (84%), Grant (85%), LaSalle (90%), and Vernon (74%). More revealing still is the proportion of District 4's population that falls outside the boundaries of these versions of the "old Eighth." For example, nine of District 4's fifteen parishes fall outside the boundaries of District 8 from the late 1960s (these nine parishes are Caddo, Red River, De Soto, St. Martin, St. Landry, Lafayette, Ascension, East Baton Rouge, and Evangeline). These parishes—fully outside the "old Eighth" of the late 1960s—are home to 72% of District 4's total population and 80% of District 4's black population. The figures are similar for the "old Eighth" from the early 1970s.

The same pattern emerges in the parishes *added to* the "old Eighth." Five of District 4's fifteen parishes—Caddo, DeSoto, and Red River at the northwest tip, and St. Martin and Lafayette in the south-central part—were *never* included in *any* configuration of the "old Eighth." DeSoto and those parts of Caddo and Red River parishes that allow District 4 to reach to Shreveport have mostly (53 %) black voters, while voters in the excluded parts are predominantly (88%) white. Likewise, the portions of St. Martin and Lafayette included in District 4 are about 57% black, while the fenced-out portions of these parishes are about 85% white. Overall, the areas added from these five parishes—never part of *any* version of the old Eighth—contain approximately 36% of District 4's black population.

The State's "Red River valley theory" was similarly unavailing, as it cannot conceivably be deemed the unifying force behind District 4. *Hays II*, U.S. App. at 5a. Rather than cutting a wide swath stretching miles on both sides of the Red River, District 4 jumps from one side to the other as necessary to grab black voters or to jettison white ones. *See* Mot. to Affirm at 9a (Caddo), 11a (Natchitoches), 12a (Rapides). Nor can the State's theory justify District 4's extension to East Baton Rouge and Lafayette, which are nowhere near the Red River but together supply more than 35% of District 4's black population. These points, obvious to the three district-court judges familiar with Louisiana geography, as well as its cultural and political history, only underscored the lack of any credible justification for District 4. Not surprisingly, then, the court dismissed Louisiana's ostensible race-neutral justifications as nothing but "*post hoc* rationalization" and "mere pretext." *Hays II*, U.S. App. at 5a.

Louisiana complains that Act 1 should have been considered "presumptively valid" under *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), and that the district court unfairly treated the "old Eighth" justification as "irrelevant." La. Br. at 20-22. But *Voinovich* did not involve an equal protection challenge. 113 S. Ct. at 1157. Plaintiffs' *prima facie* case shifted to Louisiana the burden of rebutting the inference that it had "segregate[d] the races for purposes of voting." *Hays II*, U.S. App. at 3a. Having heard six days of trial on Act 42 and Act 1, the district court fully appreciated the record differences between District 4 and the "old Eighth," *id.* n.2, and considered them before finding that the "*fundamental factor driving Act 1 was race.*" *Id.*

Appellants' desperation to avoid strict scrutiny leads them to dwell obsessively on the very next sentence in the district court's opinion: "Race-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." *Hays II*, U.S. App. at 5a. *See* U.S. Br. at 9, 10, 11, 12, 14, 18, 20; La. Br. at 9, 13, 15 n.16. On appellants' view, that sentence establishes that the district court ignored *Shaw*'s observation that "[t]his Court has never held that race-conscious state decisionmaking is impermissible in *all* circumstances." 113 S. Ct. at 2824. But that interpretation of the district court's opinion is untenable. The quoted sentence immediately follows the court's finding that "*the fundamental factor driving Act 1 was race*"; that finding would have been quite gratuitous if the district court decided to subject District 4 to strict scrutiny simply because Louisiana was "aware" of race in drafting Act 1. To the contrary, the district court properly set forth and applied the legal standard developed in *Shaw*, *Wright*, and *Arlington Heights*, *see Hays I*, U.S. App. at 48a n.12; 49a n.17; 69a nn.45 & 46; *Hays II*, U.S. App. at

3a-5a, under which state action is subject to strict scrutiny if "motivated" by race.

What exactly the district court meant by "[r]ace-conscious" in the oft-quoted sentence is not entirely clear; it could well have used the term as a synonym for "race-based." *See, e.g.*, Random House Dictionary of the English Language 432 (2d ed. 1987) (defining "conscious" as, among other things, "deliberate; intentional" and "acutely aware of or concerned about"). In any event, there is no need to parse the term's fine shades of meaning, as "[t]his Court reviews judgments, not statements in opinions." *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2653 n.5 (1994) (internal quotation omitted). Here, the district court expressly found that "the fundamental factor driving Act 1 was race," and that finding is not clearly erroneous. *Gingles*, 478 U.S. at 79. Based on that finding, the district court was entirely justified in applying strict scrutiny.

II. ACT 1 CANNOT SURVIVE STRICT SCRUTINY.

Strict scrutiny is the most demanding form of judicial review—only state laws "narrowly tailored" to serve a "compelling governmental interest" can survive. *See, e.g.*, *Shaw*, 113 S. Ct. at 2825. "Indeed, the failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact." *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring). Louisiana and the United States proffer two "compelling interests" to justify District 4: (1) the need to comply with Sections 2 and 5 of the Voting Rights Act, and (2) the need to "ameliorat[e] the effects of severely racially polarized voting and overcom[e] past discrimination." La. Br. at 38, 32-39; *see also* U.S. Br. at 27-34. Neither of these asserted interests, however, can withstand even casual scrutiny—which may explain why appellants labor so mightily to avoid strict scrutiny in the first place.[9]

A. A Mistaken Belief That Act 1 Was Compelled By The Voting Rights Act Is Not a Compelling State Interest.

Appellants start, plausibly enough, with the proposition that compliance with federal law qualifies as a compelling state interest for purposes of strict scrutiny. While uncontroversial in the abstract, that proposition is irrelevant in this case. To "comply" with a law is "to act or be in accordance with [the law's] wishes, requests, demands, requirements, conditions, etc." Random House Dictionary of the English Language 419 (2d ed. 1987). As a matter of language and logic, Louisiana has *no* interest—much less a compelling one—in "complying" with requirements of federal law that do not, in fact, exist. A State's interest in complying with a federal law necessarily derives from the federal law itself, and cannot derive from an invalid requirement or a requirement of the State's own imagining. *See, e.g., Shaw*, 113 S. Ct. at 2830 ("States certainly have a very strong interest in complying with federal antidiscrimination laws *that are constitutionally valid as interpreted and as applied*.") (emphasis added); *UJO*, 430 U.S. at 162-163 (plurality opinion) (State has no valid interest in doing more than "the Attorney General was *authorized* to *require* it to do") (emphasis added).

Appellants attempt to sidestep this point by asserting that the relevant question is whether Louisiana *"legitimately believed"* or *"reasonably concluded"* that the Voting Rights Act required the creation of a second majority-minority district, U.S. Br. at 30 (emphasis added)—not whether the Act *actually*

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[9] Because appellants cannot establish any "compelling interest to justify District 4," there is no way to ascertain whether the district is "narrowly tailored" to serve such an interest. *See, e.g., Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583, 595 n.15 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989).

required the creation of such a district. *See also* La. Br. at 33 (test is whether State "*reasonably believes* that its failure to take such measures would support a *prima facie* case of a constitutional or statutory violation"). This "legitimate belief" test, appellants contend, is necessary to afford States "a margin of safety that will encourage . . . compliance with the Voting Rights Act." U.S. Br. at 27. *See also* La. Br. at 35 (arguing for "some breathing room for states . . . permitting them to take remedial action without awaiting the final convergence of all facts constituting unassailable proof of a Section 2 violation").

Appellants' "margin of safety" or "breathing room" argument is not without superficial appeal. It is certainly desirable, where possible, to construe federal law to afford some leeway between what one provision requires and what another forbids; a regulated party would face perpetual peril if a mistake with respect to one provision necessarily amounted to a violation of another. Indeed, this Court consistently has adhered to a maxim that creates "breathing room" where a statute arguably requires what the Constitution forbids: "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is *plainly contrary* to the intent of Congress." *DeBartolo v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) (emphasis added); *see also Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

Appellants, of course, would turn this canon upside down—rather than construing the Voting Rights Act narrowly to avoid a serious constitutional problem, they want to construe the Constitution narrowly to avoid a conflict with their own remarkably expansive interpretation of the statute. In effect, they ask this Court to recognize an unprecedented constitutional defense: state action can not violate the Constitution if based on a "legitimate" or "reasonable"—albeit mistaken—belief about what a federal statute requires. So long as a State's heart is pure, the argument goes, it cannot deny a citizen equal protection of the laws. Although appellants apparently miss the irony, their argument boils down to the proposition that Louisiana's heartfelt desire to comply with the Voting Rights Act (a statute passed to implement the Constitution's Civil War Amendments) necessarily immunizes the State from alleged violations of those very Amendments.

Our law has never granted States any "good faith" or "breathing room" defense to constitutional violations, and there is no reason to introduce one now. Indeed, no principle is more basic in Anglo-American law than that ignorance of the law is no excuse. *See, e.g.*, *Lambert v. California*, 355 U.S. 225, 228 (1957); *cf.* 1 Wharton's Criminal Law and Procedure § 162; Williams, Criminal Law: The General Part §§ 52-74 (2d ed. 1961); Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641, 642 (1941). Except in exceptional circumstances, *see, e.g.*, *Ratzlaf v. United States*, 114 S. Ct. 655, 663 (1994) (statutory requirement of "wilfulness"); *Cheek v. United States*, 498 U.S. 192, 199-200 (1991) (same), parties are held legally responsible for their conduct *regardless of whether they knew their conduct was unlawful or affirmatively sought to comply with the law*. *See, e.g.*, *Barlow v. United States*, 32 U.S. (7 Pet.) 404 (1833). A mistaken attempt to comply with the law may absolve a party of *moral* culpability, but it provides no *legal* defense.

This fundamental principle applies to governments as well as individuals. The Court has *never* accepted—nor, as far as appellees are aware, seriously entertained—the proposition that the mere *desire* to comply with a statutory or constitutional provision immunizes state action from constitutional challenge. Where state action is alleged to have violated the Constitution, the question is not whether the State's action was motivated by a desire to violate or comply with the law, but only whether it *actually did so*. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. at 271 (state interest in avoiding violation of Establishment Clause cannot justify violation of Free Exercise Clause); *see also*

Doe v. Small, 964 F.2d 611, 618 (7th Cir. 1992) (*en banc*) (same); *Cunico v. Pueblo School District*, 917 F.2d 431, 438 (10th Cir. 1990) (school board's desire to comply with federal statute does not justify violation of Fourteenth Amendment, even where school board's interpretation of federal law derived from federal agency).[10] To be sure, individual state actors may be entitled to invoke an immunity defense where they reasonably believed their conduct to be lawful, but that defense does not negate—indeed, it presupposes—the underlying constitutional violation. *See, e.g., Hafer v. Melo*, 112 S. Ct. 358, 361-62 (1991); *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985).

Nor does the purity of a State's motives become relevant where, as here, the constitutional provision at issue contains an intent requirement. To establish a violation of the Equal Protection Clause, a plaintiff cannot simply point to state action causing a disparate effect on different racial groups; rather, the plaintiff must either directly or inferentially establish that the action was "motivated by race." *Arlington Heights*, 429 U.S. at 266; *Washington v. Davis*, 426 U.S. at 238-48. As in other areas, however, the relevant intent is not a specific intent to *violate the law*, but a specific intent to *carry out the act in question*. *Cf. United States v. Feola*, 420 U.S. 671, 684-86 (1975); *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563-65 (1971); *Browder v. United States*, 312 U.S. 335, 341 (1941); *American Surety Co. v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (Hand, J.). State action motivated by race, therefore, is simply not the same as state action motivated by a desire to violate the Fourteenth Amendment.

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[10] This Court has, of course, held that the exclusionary rule of the Fourth Amendment does not apply where the police carry out a search in good-faith reliance on an invalid warrant. *See United States v. Leon*, 468 U.S. 897, 913 (1984). That holding, however, is based on the proposition that the exclusionary rule is a judge-made prophylaxis not *itself* mandated by the Constitution. This exception, indeed, proves the general rule: if "good faith" negated the underlying Fourth Amendment violation in the first place, the Court would have had no need to devise a "good faith" exception to the exclusionary rule.

In short, while Louisiana's desire for "breathing room" to comply with the Voting Rights Act is understandable, it is no defense to a constitutional violation. In assessing the validity of Louisiana's asserted "compelling interest" in complying with the Voting Rights Act, the issue is not the reasonableness of the State's asserted "belief" about the Act's requirements, but the Act's requirements themselves.

B. Act 1 Was Not Compelled By the Voting Rights Act.

Even if appellants' "reasonable belief" argument were correct, it would not help them in this case. Under this Court's precedents, the interpretation of the Voting Rights Act now advanced by Louisiana and the Solicitor General can most charitably be described as farfetched. Neither Section 5 nor Section 2 of the Voting Rights Act required Louisiana to create a second majority-minority district on this record.

1. Act 1 Was Not Compelled By Section 5 of the Voting Rights Act.

The requirements of Section 5 of the Voting Rights Act are entirely procedural: before a covered jurisdiction may make a districting change, it must seek either (1) a declaratory judgment from the District Court for the District of Columbia, or (2) preclearance from the Attorney General of the United States. *See* 42 U.S.C. § 1973c (1988). Section 5 thus imposes no substantive requirements—a covered jurisdiction fulfills its statutory obligations by seeking the requisite approval, and may implement its plan absent an objection.

The most obvious flaw in the argument that Section 5 compelled Lousiana to create a second majority-minority district, therefore, is that the State never sought approval of a plan with only one such district from either the Attorney General or the District Court. This case might be different if the federal authorities had compelled Louisiana to create two majority-black districts, but any compulsion here was entirely self-imposed. *Compare International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 209 (1991) (manufacturer's self-imposed desire to avoid potential state tort liability no defense to violation of federal statute); *and Colorado v. Connelly*, 479 U.S. 157, 165-67 (1986) (self-imposed "compulsion" to confess does not render confession inadmissibly coerced) *with Farmers Educ. & Coop. Union of America v. WDAY, Inc., 360 U.S. 525, 530-35 (1959)* (federal statute *compelling* broadcaster to provide uncensored "equal time" to rival political candidates necessarily immunizes broadcaster from liability under state defamation law).

While the absence of federal compulsion here disposes of appellants' Section 5 argument, even if the Justice Department *had* rejected a plan with only one majority-minority district, Act 1 would remain vulnerable if Louisiana "did more than the Attorney General was authorized to *require* it to do under the nonretrogression principle of *Beer*." *Shaw*, 113 S. Ct. at 2831 (quoting *UJO*, 430 U.S. at 162-163 (plurality opinion)). And even if the Attorney General had interpreted the Voting Rights Act to require a second majority-minority district in Louisiana, that interpretation would not be entitled to deference to the extent it raised serious constitutional problems. *DeBartolo*, 485 U.S. at 575.

Appellants maintain that the absence of federal complusion is immaterial; instead, they effectively insist that Louisiana could have "reasonably predicted" that it would be required to create a second majority-black district. The need to defer to "reasonable predictions" about what the federal authorities might require, we are told, follows from (1) the Attorney General's "primary responsibility" under the Act, (2) the deference owed to "the Attorney General's judgment," and (3) the need to prevent States from "display[ing] the maximum possible defiance of the federal executive branch." U.S. Br. at 31, 33; La. Br. at 37.

Louisiana's "prediction" that a second majority-black district was necessary, in turn, is said to be reasonable in light of three considerations: (1) a 1983 case requiring the State's first majority-minority district in New Orleans, *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1988); (2) the Attorney General's previous objection to the BESE redistricting plan; and (3) the existence of previous Louisiana districts resembling District 4. U.S. Br. at 31; La. Br. at 36-37.

But any such open-ended "prediction" theory truly would give States "*carte blanche* to engage in [the] racial gerrymandering" expressly rejected in *Shaw* (emphasis added). 113 S. Ct. at 2831 (emphasis added). The facts of this case illustrate the absence of any real limits on race-based districting under that approach. *Major v. Treen*, a Section 2 action, required a majority-minority district in New Orleans only *after* a trial at which the three-judge court found that a Section 2 case had been established. 574 F. Supp. at 351. It simply does not follow that Louisiana must create a second majority-minority district somewhere else *without similar proof*. Likewise, the Department's action on the BESE redistricting has no bearing on Act 1: the BESE plan contained eight, not seven, districts, each with a correspondingly lower population (530,000 vs. 600,000), thus making it easier to combine "fragmented minority concentrations" into a second majority district. Finally, the fact that versions of "Old Eighth" district might have had an odd shape in no way gives rise to an inference that any *refusal* to create a new oddly-shaped district is attributable to racial discrimination.

The deference that appellants would afford to a State's "prediction" about the Attorney General's enforcement policy is especially breathtaking when considered in light of the Section 5 review process as it exists today. Since the days of *Allen v. State Bd. of Election*, 393 U.S. 544 (1969), preclearance requests have mushroomed, from 255 in 1970 to some 23,000 in 1992.[11] The decisive work in most cases is left to junior attorneys, paralegals, and even "by employees without legal training."[12] Not surprisingly, that review process is hardly conducive to "[o]bjection letters [that] cite other objection letters or make any apparent effort to create an independent body of section 5 law based on precedent."[13] Under appellants' approach, the Voting Rights Act would be diverted further off its original course, as it would be driven not only by what zealous enforcers in Washington *actually* do,[14] but by predictions about what zealous enforcers in Washington *might* do.

This Court originally upheld Section 5 as "an uncommon exercise of congressional power" that would not be "otherwise appropriate" absent the exceptional conditions of the time. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). Both in *Katzenbach* and subsequently, individual Justices have noted that Section 5's "encroachment on state sovereignty is significant and undeniable," and reiterated the delicate constitutional questions involved. *United States v. Board of Comm'rs,* 435 U.S. 110, 141 (1978) (Stevens, J., joined by Burger, C.J., and Rehnquist, J., dissenting); *Katzenbach*, 383 U.S. at 355 (Black, J., concurring in part and dissenting in part). *Allen*, 393 U.S. at 586 & n.4 (Harlan, J., concurring in part and dissenting in part); *City of Rome v. United States*, 446 U.S. 156, 201-202 (1980) (Powell, J., dissenting); *id.* at 209-21 (Rehnquist, J., joined by Stewart, J., dissenting); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting); *City of Pleasant Grove v. United States*, 479 U.S. 462, 479 (1987) (Powell, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting); *Holder v. Hall*, 114 S. Ct. 2581, 2611 (Thomas, J., joined by Scalia, J., concurring in judgment). But when *Katzenbach* was decided, surely no one envisioned that State officials would resort to reading "tea leaves" from the Justice Department, or worse still, acting on a nudge and a wink from "middle level bureaucrat[s]" in the Civil Rights Division. *Hays II*, U.S. App. at 7a n.3.

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[11] Department of Justice, Civil Rights Division, Record of Number of Changes by State and Calendar Year, 1965-1995 (dated Jan. 4, 1995).

[12] Abigail M. Therstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 159 (1987).

[13] *Id.* at 161 (quoting Hiroshi Motomura, *Preclearance under Section Five of the Voting Rights Act*, 61 N.C. L. Rev. 189, 192 (1983)).

[14] It is perhaps a euphemism to call the Justice Department's enforcement of Section 5 "zealous." In *Johnson v. Miller*, 864 F.Supp. at 1368, the district court termed the Department's practices "disturbing," observing that "in a notable faux pas, DOJ's second objection letter arrived at the Office of the Attorney General of Georgia only after members of the Georgia Black Caucus were already discussing it with the press."

In any event, the district court made findings broad enough to encompass appellants' "reasonable prediction" theory when concluding that Louisiana "did not have *a basis in law or fact to believe* that the Voting Rights Act required the creation of two majority-minority districts." *Hays II*, U.S. App. at 9a (emphasis added).[15] Appellants now accept the court's finding that the failure to create a second such district would *not* result in "a retrogression of minority [voting] strength." *Id.* at 8a (emphasis added). And even, applying an unduly generous test comprehending the State's *beliefs*, the court below found that "[n]either the State nor the Department of Justice offered any evidence suggesting that failure to create a second majority-minority district would . . . have an illegal purpose or effect." *Id.* Because the court applied the legal test appellants now advocate, there is no basis to disturb its conclusion. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990).

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[15] Had the District Court not rejected the contention that Louisiana reasonably believed that Section 5 compelled its redistricting plan, this case might raise significant questions regarding the entire Section 5 enforcement scheme. Examples include: (1) the statutory basis, if any, for the Justice Department's claimed authority to enforce Section 2 via Section 5 preclearance, *see, e.g., New York v. United States*, No. 94-2219, 1994 WL 744179 (D. D.C. 1994); (2) the validity of the Department's policy requiring States to "maximize" the number of majority-miority districts in order to avoid a finding of discriminatory purpose, notwithstanding *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2660 (1994); *Beer v. United States*, 425 U.S. 130 (1976); (3) the appropriate deference, if any, due the Department's substantive interpretations of Section 5 in light of its enforcement role and Congress' primary delegation of decisional authority to the D.C. District Court, *see e.g., Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., joined by O'Connor, J., and Kennedy, J., concurring in the judgment); and (4) the Department's authority to override state redistricting plans beyond the extent necessary to remedy violation of the Civil War Amendments. *See City of Rome*, 446 U.S. at 209-221 (Rehnquist, J., dissenting).

2. Act 1 Was Not Compelled By Section 2 of the Voting Rights Act.

The framework for deciding whether a redistricting plan is compelled by Section 2 of the Voting Rights Act is not in dispute. The "Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 113 S. Ct. 1075, 1081 (1993). Because States' redistricting authority does not flow from the Voting Rights Act, "[f]ederal courts are barred from intervening in state apportionment in the absence of a violation of federal law." *Voinovich*, 113 S. Ct. at 1156. The principal sources of federal limitations on state redistricting authority, then, are the Fourteenth and Fifteenth Amendments *see, e.g., Voinovich*, 113 S. Ct. at 1157, 1159—although, as noted above, States certainly have "a very strong interest" in complying with the Voting Rights Act to the extent its provisions *"are constitutionally valid as interpreted and as applied."* *Shaw*, 113 S. Ct. at 2830 (emphasis added).

This Court first addressed the need to balance state sovereignty against federal limitations in the redistricting context in *UJO*. There, even though New York "adhered to traditional districting principles," *Shaw* 113 S. Ct. at 2829, it mustered the votes of only three Justices when it "deliberately used race in a purposeful manner." *UJO*, 430 U.S. at 165. Justice Brennan's concurring opinion eloquently expresses the concerns arising from a State "policy of benign racial sorting":

it may (1) "disguise . . . illicit objectives" and "frustrate successful efforts at coalition building across racial lines"; (2) "stimulate our society's latent race consciousness" and "stigmatize recipient groups"; and (3) "[b]e viewed as unjust . . . especially by thse individuals who are adversely affected." *Id.* at 172-175. Just as eloquently, this Court reaffirmed Justice Brennan's concerns in *Shaw*: racial gerrymandering "reinforces racial sterotypes and threatens to undermine our system of representative democracy by signalling to elected officials that they represent a particular racial group rather than their constituency as a whole." 113 S. Ct. at 2827.

The Solicitor General would brush these concerns aside and allow a State to engage in explicitly race-conscious redistricting whenever it "legitimately believes that each of the three *Gingles* preconditions could be established against it and when, without [creating a new majority-minority] district, the minority group remains substantially underrepresented when compared to the group's proportion of the population." U.S. Br. at 28-29. Appellants thus dilute a "strong basis in evidence" down to a "sound basis for believing." *Id.* at 22 (citing *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986) (plurality opinion) and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (O'Connor, J., concurring in the judgment). Then, they baldly assert that "overwhelming evidence" establishes that blacks in Louisiana are politically cohesive and the State's whites usually vote as a bloc; appellants pause only on "the question whether the minority population is sufficiently large and compact"—an issue on which they argue the adverse finding below was "erroneous." U.S. Br. at 29; La. Br. at 33-34.

Once again, appellants conflate what Louisiana allegedly "believed" the Voting Rights Act to require and what the Act actually *does* require. *See* pp. 35-38, *supra*. While it is true that "a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite," that in no way excuses a State from providing "statistical proof" and eventually providing the necessary "evidence of its remedial purpose." *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in judgment).[16] "[S]imple legislative assurances of good intentions cannot suffice"; rather, the State must provide "a strong basis in evidence for its conclusion that remedial action was *necessary*." *Croson*, 488 U.S. at 510 (plurality opinion) (emphasis added).

Louisiana has simply failed to provide the requisite "strong basis in evidence" to justify "remedial action" as "necessary" under Section 2 of the Voting Rights Act. The district court found that "[t]he evidence convincingly proves that the State cannot clear the first *Gingles* hurdle," compactness. U.S. App. at 8a. There is no dispute that "compactness" under *Gingles* is a question of *fact*. *See Gingles*, 478 U.S. at 77-79; *Westwego Citizens for Better Gov't v. Westwego*, 906 F.2d 1042, 1046-47 (5th Cir. 1990) ("The appropriate method of establishing the first *Gingles* factor is a 'matter of fact'"). Moreover, in contrast to other cases, Louisiana here offered *no statistical evidence whatsoever* to show that District 4 was compact. *See Johnson v. Miller*, 864 F. Supp. at 1388 (statistical data offered by Georgia); *Vera v. Richards*, 861 F. Supp. at 1328 (statistical data offered by plaintiffs).[17]

---

[16] The court below did not hold that "there *must* be 'findings of . . . statutory violations.'" U.S. Br. 27 (emphasis added). Instead, it held that the State must "'demonstrate a strong basis in evidence for its conclusion that remedial action was necessary.' Such a basis *may be drawn* from judicial, legislative, or administrative findings of constitutional or statutory violations." *Hays II*, U.S. App. 7a (citation to *Croson* omitted) (emphasis added).

[17] The omission of statistical data is striking since compactness, whether measured by either or both of two statistical techniques, showed District 4 in Act 42 to be one of the *least* compact districts in the Nation. *See* Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts,"*

(continued...)

Appellants instead rely almost exclusively on the opinion of "the state's demographer, Glenn Koepp, [who] testified that District 4 *is* reasonably compact." La. Br. at 34.[18] His testimony, however, only underscores the weakness of appellants' Section 2 claim: "I truly believe that this is the most compact—the Fourth District in this plan is the most compact second minority district in the state that *has 55 percent registered to vote minority.*" J.A. 125. (emphasis added). The following exchange ensued:

> JUDGE WALTER: Why is it reasonably compact? I mean it's obviously not compact. Now how is it reasonably compact?
>
> THE WITNESS: Your Honor, my opinion of that, and I think it's even in the decision by the Supreme Court, compactness is in the eye of the beholder. You know it when you see it.
>
> JUDGE WALTER: It's not compact to the eye of this beholder.

J.A. 127. The district court did not clearly err in finding that this and similar evidence "confirmed that Louisiana's minority poulation is simply not sufficiently concentrated to meet

---

[17] (...continued)
and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno, 92 Mich. L. Rev. 483, 553-575 (1993). If District 4 in Act 1 were really more compact than its counterpart in Act 42, Louisiana presumably would have presented statistical evidence to prove the point.

[18] Koepp, an assistant secretary of the Louisiana Senate and the official responsible for drawing Act 1's boundaries, did not testify as an expert at trial. The court's reference to "the State's own expert" presumably means the State's expert geographer, Dr. Hilliard, who introduced data and maps on Louisiana congressional districts since 1912. These data confirm that Act 1's District 4 is not compact since it spans a greater distance than any congressional district in Louisiana history. Castille & Hilliard Decl., USX 8, Table 1.

Gingles minimum requirements." *Hays II*, U.S. App. at 8a n.4.[19]

Appellants also err in claiming that the evidence on bloc voting "leav[es] no doubt whatsoever concerning the other two *Gingles* factors." La. Br. at 35; U.S. Br. at 29. But the law is well-established that neither the parties nor the court "may . . . presume bloc voting." *Growe*, 113 S. Ct. at 1085. Because appellants failed to clear *Gingles'* first hurdle, *Hays II* made no conclusive findings regarding either black political cohesion or white bloc voting. In considering Act 42, however, *Hays I* found that "the evidence supported an average, *net* white cross-over vote in non-judicial elections of between 10% and 25%." *Hays I*, U.S. App. at 83a-84a.

Appellants ignore this factual finding entirely, preferring to rely instead on evidence from an expert (Engstrom) whose testimony the *Hays I* court expressly rejected. La. Br. at 30-31; U.S. Br. at 29. Engstrom's presentation on bloc voting dealt only with elections in which a black candidate opposed a white candidate. Engstrom Declaration, J.A. 181-93. The Voting Rights Act, of course, protects minority-*preferred* candidates, not minority-*race* candidates. *Gingles*, 478 U.S. at 68 ("[I]t is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important.")

---

[19] The court also expressly relied on the United States' Exhibit 2. *Id.* That Exhibit, a schematic map of Louisiana with an overlay of District 4, demonstrates that District 4's black population resides overwhelmingly in four widely-separated cities, anchored by Shreveport and Baton Rouge at the District's north and south ends respectively. On closely similar facts, the district court in *Johnson v. Miller*, 864 F.S upp. at 1389, found that "[t]he populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties . . ." There, as here, "DOJ's insistence that they are 'compact' renders the term meaningless." *Id.* Ultimately, appellants claim only that District 4 is "not materially stranger in shape" than other districts elsewhere—but that is hardly the test announced in *Gingles*. La. Br. at 35.

(plurality opinion). The district court, therefore, was free to credit the testimony of plaintiffs' expert, Dr. Ronald Weber, who presented a far broader range of data, including the results of dozens of single and mixed-race elections for the Louisiana House and Senate, as well as recent races for Governor and United States Senator in which the black-preferred candidate was elected. PX 8.

C. Act 1 Cannot Be Justified By A Perceived Need To Remedy Historical Inequity.

Appellants ultimately deploy their most sweeping justification for District 4: "Louisiana's history of racial discrimination and the patterns of racially polarized voting" independently warrant a second majority-minority district. La. Br. at 38; U.S. at 34. It is elementary, however, that a State cannot insulate discriminatory action from review simply "by conceding that [it] discriminated in the past, now that it is in [its] interest to make such a concession." *Wygant*, 476 U.S. at 278 n.5 (plurality opinion). And as for racially-polarized voting, not only was there no finding below, but there was no reason to reach the issue in light of the court's dispositive finding that Act 1 failed *Gingles'* first precondition. *See* pp. 46-47, *supra*. Moreover, the district court flatly rejected the suggestion that there was any "concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures." *Hays II*, U.S. App. at 10a.

Even if this factual finding were erroneous, appellants' invocation of past discrimination to justify present discrimination would still fail as a mater of law. Appellants seize upon an apparently approving reference in the *UJO* plurality opinion to a potential remedy that would assure the "fair allocation of political power between white and nonwhite voters." 430 U.S. at 167 (plurality opinon). The Solicitor General claims that "[n]o other Justices in *UJO* addressed that issue." U.S. Br. at 34. But as this Court noted in *Shaw*, Justice Brennan did indeed address the point by rejecting "benign racial sorting" for the reasons noted previously. *See* p. 44, *supra*. Subsequent decisions, moreover, have condemned racial *group* remedies under the Voting Rights Act except where a minority is "essentially shut out of the political process." *Davis* v. *Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring). And far from creating remedies beyond the Act, recent decisions hold that a Section 2 claim may not exist even where all three *Gingles* criteria are satisfied. *DeGrandy*, 114 S. Ct. at 2663; *Nipper v. Smith*, 39 F.3d 1494, 1512 (11th Cir. 1994) *(en banc)*. By contrast, appellants' expansive additional remedy would make *Gingles'* requirements superfluous.

These precedents are enough to reject appellants' "fair allocation" argument without reaching the more far-reaching issues it might present.[20] Any remedy that portends a "fair allocation of political power between white and nonwhite voters," *UJO*, 430 U.S. at 167 (plurality opinion), would involve courts even more deeply than now in deciding which racial classifications are "benign" and which are not. *See Shaw*, 113 S. Ct. at 2834; *Metro Broadcasting*, 497 U.S. at 609 (O'Connor, J., dissenting). Judicial scrutiny of that sort is at best a hazardous undertaking that would return this Court to the days of *Plessy*—albeit characterizing the inquiry not as "separate but equal" but instead "unequal but benign," *id.* at 638 (Kennedy, J., dissenting).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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[20] Some have suggested, for example, that "[A] constitutional rule capable of constraining political results, not merely subjecting them to judicial oversight, must either require the government to classify its citizens by race or else forbid the practice: there is no middle ground." A. Kull, *The Color-Blind Constitution* 223 (1992).

Respectfully submitted,

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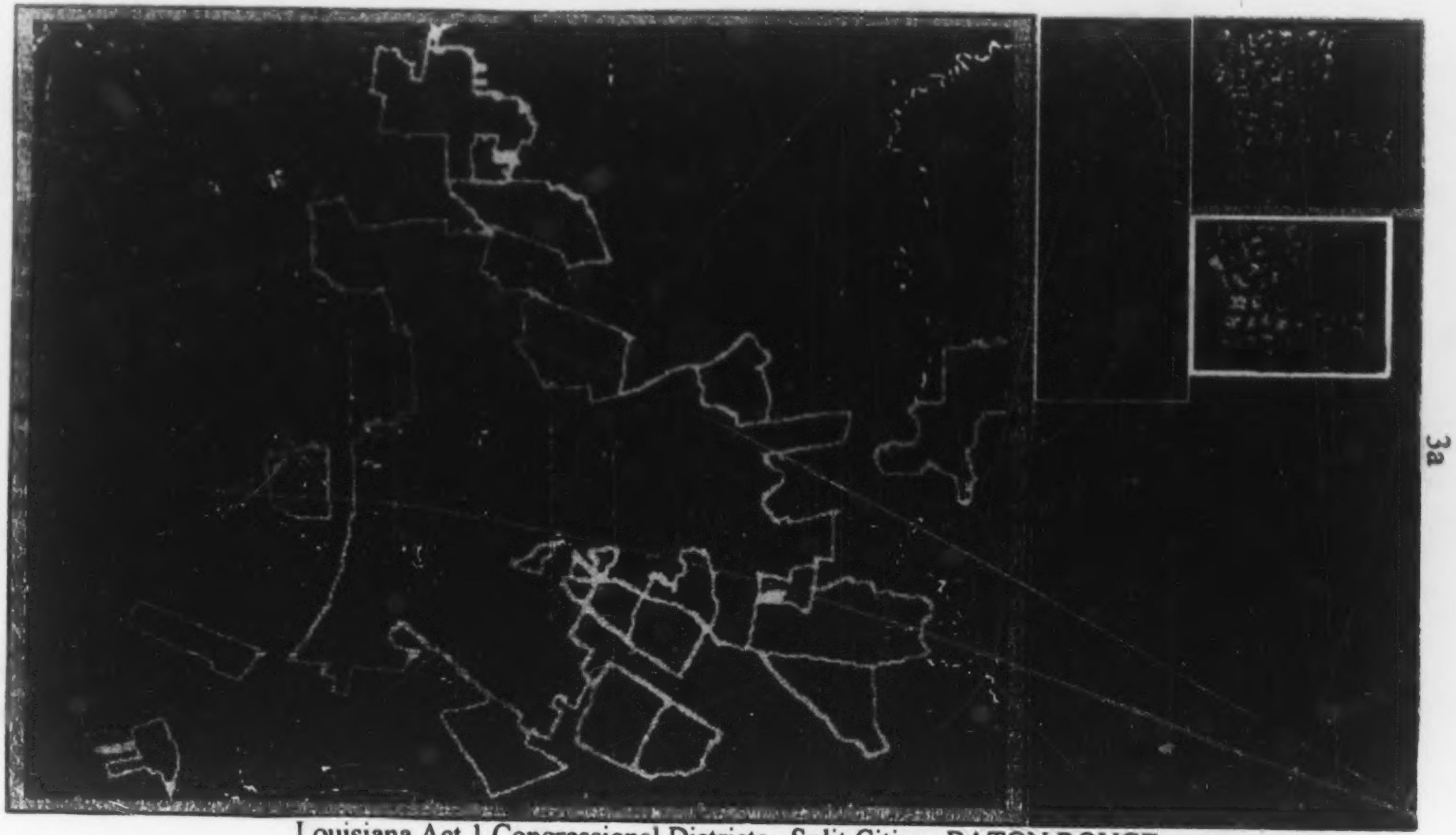
APPENDIX

BEST AVAILABLE COPY

Louisiana Act 1 Congressional Districts. Split Cities: SHREVEPORT

Louisiana Act 1 Congressional Districts. Split Cities: LAFAYETTE



Louisiana Act 1 Congressional Districts. Split Cities: BATON ROUGE

Louisiana Act 1 Congressional Districts. Split Cities: ALEXANDRIA

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Supreme Court, U.S.
FILED
APR 11 1995
OFFICE OF THE CLERK

No. 94-558 and 94-627

◆

In The
Supreme Court of the United States
October Term, 1994

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UNITED STATES
Appellant,
v.
RAY HAYS, et al.,
Appellees.

◆

STATE OF LOUISIANA, ET. AL.
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◆

On Appeal from the United States District Court
for the Western District of Louisiana

◆

REPLY BRIEF OF APPELLANTS, STATE OF LOUISIANA, ET AL.

◆

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REPLY BRIEF OF APPELLANTS, STATE OF LOUISIANA, ET AL.

◆

INTRODUCTION

Appellees vainly defend a decision the district court did not write, based on factual assertions appellees did not support with evidence below. The district court's decision is based on a fundamental legal error that appellees never seriously confront: the court erroneously held that the use of old District 8 as a model for drawing District 4, and the resulting physical resemblance between them, was legally *irrelevant* because the court would not presume that the old 8th District was constitutional. As the court stated, "the tradition of the past regarding the old eighth district" is not "binding on this Court, due to the fact that the old eighth district was never challenged on constitutionality by any court in the United States." J.S. App. 16.

Instead of defending that holding, appellees seek to circumvent it by inventing arbitrary criteria according to which District 4 fails to qualify as a district "truly" modelled on the old 8th. This effort is unsuccessful, not only because it fails to address the real basis of the district court's ruling, but also because it disregards all the testimony at trial and is grounded on nothing more than appellees' *ipse dixit*. Part I.A. responds to those arguments and also to appellees' claim that Act 1 is constitutionally defective because it fails to maximize the use of whole parishes in drawing districts.

Appellees' other contentions fare no better. While arguing strenuously that any intentional creation of a black-majority district should subject a redistricting plan to strict scrutiny (Br. at 17-26), appellees also contend that this very holding was unimportant to the district court's decision. Hays. Br. at 34. Appellees' erroneous interpretation of *Shaw v. Reno*, however, is precisely the interpretation employed by the district court in striking down Act 1. Part I.B. responds to appellees' arguments on this point.

Appellees further contend, contrary to *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), that only an actual finding of a violation of the Voting Rights Act should be sufficient to authorize a race-conscious redistricting plan (Br. at 39-40, 41), while arguing that the district court's similar erroneous statement of the governing law was not really the holding of the court. *Id.* at n. 16. They misstate the record in an attempt to argue that voting is not racially polarized in Louisiana, an uphill battle at best in a state with a 30% black population where no black candidate has been elected to a statewide office or to a majority-white congressional or legislative district in this century. Louisiana responds to these arguments in Part II. Before examining those points in detail, we wish to underscore the central facts that are dispositive under any interpretation of the Constitution and Voting Rights Act. As the district court predicted in 1993 in *Hays I*, the Louisiana Legislature was able to draw a substantially more compact second majority-black district after Act 42 was invalidated. The Legislature was able to do so by using the old, 38%-black, 8th Congressional District as a model and starting point, creating a district with a 55% majority of black registered voters that resembles prior versions of the old 8th. As all witnesses confirmed, Act 1 also successfully satisfies Louisiana's non-racial redistricting objectives; indeed, no plan considered by the Legislature in 1994, whether containing two majority-black districts or only one, achieved a better correspondence with Louisiana's traditional regions than did Act 1. Hilliard Test., J.A. 84-85. The plan results in two out of seven districts that have majority-black populations, in a state that is 30% black in population. The alternative redistricting plan drafted by the district court itself proves that no congressional plan can be drawn in Louisiana that does not combine geographically dispersed populations, different media markets, and different regions of the state in a single district. Louisiana's redistricting plan, in sum, is a remarkably successful effort to balance the myriad factors relevant to congressional redistricting, and should not have been invalidated under any sensible interpretation of the Fourteenth Amendment.[1]

---

[1] It will not do to invoke Judge Wisdom's faith, Hays Br. 1-2, to condemn Act 1: "The Constitution is both color-blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States v. Jefferson County Board of Education*, 372 F.2d 836, 876 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967). *See also* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 Columbia L. Rev. 1060, 1076-78 (1991).

I. APPELLEES' ARGUMENTS FUNDAMENTALLY MISCONSTRUE THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT AND THIS COURT'S HOLDING IN *SHAW*.

A. The District Court Misconstrued *Shaw* in Declaring Act 1 "Bizarre."

The district court held that any resemblance between District 4 and the old 8th congressional district was legally *irrelevant* unless the state could prove the constitutionality of the old 8th. As we explained at pp. 20-21 of our Brief, this was clear error; the resemblance between District 4 and prior versions of the white-majority old 8th District is highly relevant under *Shaw*.

Appellees make little effort to defend the district court's holding in this regard, preferring instead to argue that District 4 is flawed because it is not "truly" modelled on the old 8th District. Hays Br. at 32. This effort fails, as appellees are completely unable to overcome the obvious visual correspondence between District 4 and the old 8th from 1967-92, and they offer nothing to refute the testimony of the many witnesses who uniformly confirmed that the 8th District *was in fact* used as the model for drawing the 4th. Indeed, the testimony established *not only* that the old 8th district was the basis for the demographer's work in drawing Act 1, but that Louisiana legislators in fact cited the resemblance between District 4 and the old 8th as a basis for supporting the plan during the legislative process leading to the adoption of Act 1. *See* testimony cited in La. Br. at 6 & n.8.

Appellees' arguments, accordingly, depend on setting up arbitrary tests, not supported by any testimony, to determine what should or should not "count" as a district modelled on the old 8th. Thus, they announce that any district "truly" modelled on the old 8th would include Rapides, Avoyelles, Pointe Coupe, West Baton Rouge, and Iberville parishes. Hays Br. at

32. But even if this arbitrary pronouncement were controlling, it would not assist appellees, because District 4 in fact *includes* some or all of four of those five parishes.

Straining further to find differences between District 4 and the old 8th, appellees complain that District 4 includes some parishes not previously included in the old 8th. Hays Br. at 32. But most of these new parishes, including De Soto, Red River, St. Martin, and Lafayette, had bordered previous versions of the old 8th, hardly making it remarkable that they would now be included in District 4.

By picking out an arbitrary set of criteria, any one of the various versions of the old 8th can be made to appear anomalous and not "truly" modelled on the other versions. For example, the 8th district had consistently included all or part of Vernon, Rapides, and Natchitoches parishes from 1965 through 1972; but in 1972, those three parishes were placed in three different congressional districts, with only a portion of Rapides still included in the 8th District. Pl. Ex. 3. Similarly, District 8 as it existed under the plan in effect from 1981 to 1992 contained the parishes of St. Helena and East Feliciana (two of the River parishes) that were not included in District 8 as that district existed from 1967-80. None of this means that the 8th District adopted in 1973 or in 1981 was not "truly" modelled on prior versions of the 8th, anymore than appellees' distinctions establish that District 4 was not "truly" modelled on those same prior versions.[2]

Appellees, like the district court, also incorrectly characterize Louisiana's argument concerning the significance of the old 8th district. They claim that Louisiana attempted to prove that District 4 was "race neutral" by comparing it to the old

---

[2] Contrary to appellees' assertion, the old 8th district from 1973-82 contained only 10 full parishes, not 12. See Pl. Ex. 3.

8th. Hays Br. at 11. Appellees then triumphantly point out that District 4 is not in fact "race neutral," thus allegedly proving that any reliance on the old 8th district is "pretextual." But Louisiana made no such argument. Louisiana has never denied that it intended to create a black-majority district, if it could do so in a reasonable manner consistent with its redistricting history. The use of the earlier, 38% black, 8th district as a model is relevant because it shows that the state endeavored to draw a majority-black district in a manner similar to districts employed in the past, precisely as *Shaw* instructs.

As Louisiana's principal brief explains, there are sound and compelling reasons to employ a standard that measures "bizarreness" under *Shaw* with reference to district configurations previously employed by the state itself. Appellees offer no plausible alternative. They do not even attempt to defend the district court's conclusion that District 4 is defective because it combines different religious groups and different crops in the same district. Their silence only confirms that the district court erred in judging District 4's constitutionality by reference to these subjective redistricting preferences.[3]

Appellees rely almost exclusively upon the splitting of political subdivisions to support their claim that Act 1 is "bizarre" under *Shaw*. Br. at 14, 28-30. We disposed of this argument at pp. 27-28 of our principal Brief, and only a few points deserve further comment. Indeed, in a state where parishes themselves need not be composed of contiguous territory,[4] and where the Mississippi River and Red River themselves divide many whole parishes, appellees' heavy reliance on parish splits is particularly unpersuasive.[5]

---

[3] Indeed, far from defending the district court on this point, appellees now assert that under their reading of *Shaw*, a state *may not* "deliberately" create a predominantly Roman Catholic election district. Hays Br. at 24. This news will obviously be startling for cities such as Boston, New York, and Chicago, among others.

[4] St. Martin Parish has two geographically separate portions, divided by Iberia Parish.

Appellees argue that District 4 is impermissible because it splits four "major cities," thus including four media markets in the district. But one of these cities, Baton Rouge, has been split between different congressional districts since 1982. Moreover, if the Louisiana Legislature has split the State Capitol between different congressional districts in the past, it is difficult to argue that splitting the smaller cities of Lafayette and Alexandria between different districts is an extraordinary step for the Legislature to take.

In terms of media markets, District 4 in Act 1 compares favorably with Louisiana's previous white-majority District 8, and the appellees presented no evidence to the contrary. During the 1980s, District 8 extended south to include the expensive New Orleans media market, as well as the Alexandria and Baton Rouge media markets. District 4 does not extend as far south and therefore does not require use of the relatively expensive New Orleans market. Moreover, under the district court's remedial plan itself, a candidate running in District 4 would also have to use several media markets to reach all of his constituents. The incorporation of several different "media markets" in one district thus is common to virtually every Louisiana congressional plan that has been employed or proposed, and certainly the difference between three media markets in the old 8th and four in District 4 represents nothing extraordinary.

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[5] Dozens of congressional districts around the country are composed primarily of split counties. Indeed, this is true of most of the majority-white congressional districts attached to our Brief for comparative purposes, including the Massachusetts, New Jersey, New York, Virginia, and Washington districts. *See Congressional Quarterly's Politics In America 1994: The 103rd Congress* (P. Duncan, ed. 1994), at 709, 952, 1015, 1566, 1605.

Appellees' reliance on the racial composition of parish or city splits in Act 1 is also misplaced. The more appropriate focus is not on the racial composition of isolated portions of the district, but the racial composition of the resulting congressional districts themselves. Even with a black majority population in District 4, the congressional districts that border District 4 still range from 17.96% to 27.45% in black population. J.A. 179. Each of these allegedly "segregated" districts thus has a greater black population percentage than over 75% of the congressional districts nationwide.[6]

Other cases applying *Shaw* have upheld challenged congressional districts despite similar parish or city splits. In *Vera v. Richards*, 861 F. Supp. 1304, 1344 (S.D. Tex. 1994) (three-judge court), Juris. Statement filed, No. 94-805 (Dec. 1, 1994), the court upheld several of the challenged districts although it described those districts in precisely the same terms appellees would use to condemn District 4, noting disparities in the racial composition of split counties. 861 F. Supp. at 1325-1328 & n. 34, 1344-45.[7]

Under Act 1, five of the 12 split parishes in District 4 brought more white population than black population into District 4. For example, the portion of Evangeline Parish included in District 4 was over 62% white and only 37% black, and the split portions of four other parishes included in District 4 are also majority white (Natchitoches, Rapides, St. Landry, and St. Martin). Pl. Ex. 4. Appellees simply choose to ignore the uncontradicted trial testimony that some of the irregularities in district boundaries are, in fact, attributable to one-person, one-vote considerations or political considerations rather than racial considerations.[8]

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[6] 1990 CPH-L-117, 1990 Census Population and Housing Profile: Congressional Districts of the 103rd Congress, Table 2.

[7] For example, District 28, an approximately 250-mile-long, majority Hispanic district, was upheld although its description included the following:

> While the part of Guadalupe County split into District 28 contained a combined 52.3% African American and Hispanic population, the portion split into District 21 — represented by Republican Congressman Lamar Smith — contained only 23.4% African-American and Hispanic population. Similarly, the part of Comal County split into Congressional District 28 contained 62.1% African-American and Hispanic population, but the portion put in Smith's district was only 10.6% African-American and Hispanic population.

861 F. Supp. at 1326 n.34.

Majority-black District 2 in Act 1, whose constitutionality appellees no longer contest, was created by dividing Orleans Parish and Jefferson Parish so that most of the black population of those parishes is in District 2, leaving District 1 with a predominantly white population. Yet the appellees claim that any parish divisions which contribute to the creation of a black majority in District 4 are monstrous acts of racial "segregation." To the contrary, creation of the 4th District has the same impact as the creation of District 2: a greater integration of minorities into the political life of the State, under a plan that also satisfies the State's regional, political and other non-racial redistricting objectives.

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[8] For example, the state's demographer, Glenn Koepp, pointed out that the lines drawn in the Alexandria area take in "a lot more than . . . just the minority areas"; that predominantly white portions of the city of Baker were placed in majority-black District 4; and that various heavily black precincts along the border of District 4 were placed in the adjoining majority-white District 6 rather than in District 4. J.A. 51. Representative Joseph Accardo, Jr., chair of the House of Representatives Committee on House and Governmental Affairs, also described in detail how "the shape of the boundaries in Lafayette and St. Landry parishes were influenced by nonracial factors," including efforts to preserve as much as possible Congressman Hayes' electoral base. State Ex. 16, J.A. 197. *See also* La. Br. at 27 & n.32.

Representative Accardo's description of the House's actions on April 20, 1994, which involved House members' *nonracial* objections to various amendments the Senate had added, also contradicts appellees' unsupported assertion that the Justice Department's letter dated April 20, 1994 was somehow the basis for Act 1's adoption. Hays Br. at 7-8.

B. This Court Should Reject Appellees' Unwarranted Extension of the Fourteenth Amendment to Render All Majority-Minority Districts Constitutionally Suspect.

Under appellees' interpretation of the Fourteenth Amendment, a redistricting plan is constitutionally suspect if the state admits that it deliberately sought to comply with the Voting Rights Act by drawing a majority black district.[9] Hays Br. at 25-26. Appellees argue that this is a salutary result because it will assure that legislatively enacted redistricting plans must undergo "the most 'searching judicial inquiry'" as a condition for federal court approval. Br. at 26 (quoting *Shaw*). In any state where compliance with the Voting Rights Act has been a prevalent issue in redistricting, the legislature's enactment of a redistricting plan will thus become little more than a dress rehearsal for the event of real importance in the redistricting process: the judiciary's examination and evaluation of the redistricting choices made by the legislature. As Louisiana's Brief explains, such a vision is wholly contrary to this Court's longstanding jurisprudence on states' authority to conduct redistricting, and *Shaw* certainly never intended to endorse such a view. La. Br. at 13-19.

Appellees argue that equal protection analysis should not take into account the commands of the Voting Rights Act, because that would be tantamount to construing the Constitution to avoid a conflict with the Voting Rights Act. Their argument is a giant exercise in question-begging. If it is within Congress' power under the Fourteenth Amendment to prescribe anti-discrimination standards that are prophylactic and that make redistricting plans potentially unlawful when they have a racially disparate impact, then it cannot be a presumptive violation of the Fourteenth Amendment for the states to take intentional action to comply with those standards. Appellees have not argued that the Voting Rights Act is unconstitutional, and cannot persuasively defend an interpretation of the Fourteenth Amendment that depends upon that very assumption.

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[9] Appellees devote much of their Brief to the untenable argument that bizarre district shape is unimportant under *Shaw*, which they say establishes a requirement of color-blind redistricting. Hays Br. at 2; *id.* at 13 ("This case is not about the topology of unusually-shaped districts, but about the authority of a State to classify its citizens by race"); *id.* at 14, 21.

Appellees argue that even if their view of the Fourteenth Amendment is incorrect, the district court properly treated Act 1 as presumptively unconstitutional based on its holding that "the fundamental factor driving Act 1 was race" (J.S. App. 5). But this holding itself rests on a legally erroneous understanding of *Shaw* and the Fourteenth Amendment. The district court believed that the legislature's "specific intent" to create a black-majority district itself demonstrated a fundamentally race-driven, and therefore inherently suspect, redistricting process, a view that the district court stressed throughout the hearing on Act 1:

> THE WITNESS [Glenn Koepp, Senate demographer]: What we were doing was attempting to meet all of the criteria[.] [I]f, in fact, when I finished trying to draw that and there was no other way to put together a minority district other than a very bizarre way or if . . . it may derive serious gerrymandering in other areas, then I don't think — I know the legislature would not have adopted it, that type of plan.
>
> JUDGE WEINER: Everything you have just said in this statement presupposes an effort to get a second majority-minority district.

THE WITNESS: That was one of the things we were doing.

JUDGE WEINER:That's all I asked you and that's all Judge Walter asked you. J.A. 48.

The district court, in sum, believed that the very effort to determine if a second majority-minority district could be drawn consistent with other reasonable redistricting criteria demonstrated a fundamental racial intent that is inherently suspect. But the unreality of this standard is apparent. When Louisiana adopted Act 1, the State had just been through a trial on the legality of Act 42, after which the district court found that a "substantially" more compact majority-black district could have been drawn. Yet plaintiffs argue, and the district court agreed, that the Louisiana Legislature could not constitutionally create this substantially more compact majority-black district *unless it did so without specifically setting out to do so*. The Fourteenth Amendment simply does not impose such an incoherent rule on state redistricting efforts.[10]

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[10] Moreover, if the district court's decision on Act 1 were construed to have found that Louisiana subordinated all other redistricting goals to that of race, such a finding would, indeed, be clearly erroneous. *All* of the witnesses to testify on the subject pointed out that the state had balanced numerous other factors in drawing Act 1, and it was undisputed that no plan considered by the Legislature, whether it had two majority-black districts or only one, better reflected Louisiana's traditional regions than did Act 1. Hilliard Test., 7/21/94 p.m. Tr. 84-85, J.S. 84. As the chair of the House Reapportionment Committee stated, "The legislature, in enacting Act 1, determined that it better served the interests of all the state's citizens. Other plans that were introduced, such as House Bill 5 and other similar plans, were disproportionately skewed in favor of north Louisiana, an area that has lost population in the 1980's relative to the rest of the state." Declaration of Rep. Joseph Accardo, Jr., State Ex. 16, J.A. 196. The principal draftsman of Act 1 also testified that he would not have proposed a plan with a second majority black district if it could only be accomplished through a bizarre district configuration. Koepp Test. 7/21/94 a.m. Tr. 33-34, J.A. 48.

Appellees' proposed constitutional test suffers from fatal shortcomings. According to appellees, once a plaintiff establishes that race is "a motivating factor" in the drawing of a redistricting plan, the plan is subject to strict scrutiny unless the state establishes that "the same [plan] would have resulted even had the impermissible purpose not been considered." Hays Br. at 19, quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). But as we pointed out at pp. 15-16 of our Brief, when majority-minority congressional districts are created, the legislative record will almost always show a specific, deliberate intent to do so. Particularly in a state with a history of racial discrimination in the electoral process, many legislators will inevitably frame their support for a majority-black district in terms of achieving a measure of political fairness for a previously excluded minority. But if the legislature draws that district in a configuration similar to other, presumptively lawful white-majority districts, and in a manner that makes eminent sense for the state in terms of its other, non-racial redistricting objectives, *Shaw v. Reno* should not be read to impose a presumption of constitutional invalidity based on the legislature's subjective intent to create a black-majority district. Naturally, a different redistricting plan might have been created if the legislature had not attempted to create a black-majority district, but that begs the question of whether the challenged redistricting plan is in fact a reasonable plan. All of this demonstrates that appellees' "fallback" position — that race may be employed in redistricting, but only if it is not the "motivating" or "fundamental" factor in drawing a district — is not a fallback at all, but merely another way of saying that all intentionally created majority-minority districts are constitutionally suspect.[11]

---

[11] Although appellees rely heavily on *Arlington Heights*, that decision states that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of govern-

II. APPELLEES IGNORE SETTLED LAW IN ARGUING THAT ONLY AN ACTUAL FINDING OF A VIOLATION OF LAW WILL PERMIT STATES TO DRAW MAJORITY-BLACK DISTRICTS.

Appellees approvingly cite one description of strict scrutiny under the Equal Protection Clause as "strict in theory, but fatal in fact." Hays Br. at 34. Enthusiastically embracing this formulation, they argue that the creation of a majority-black district should be permitted only in the most limited circumstances: (1) "*after* a trial" at which an actual Section 2 violation has been found (*id.* at 40, emphasis original); or (2) after "federal authorities" (either the Justice Department or the District Court for the District of Columbia) have "compelled" the state to create a black-majority district under their Section 5 authority — a compulsion that will be present only if a state actually submits for preclearance a plan without a black-majority district, and draws a Section 5 objection. *Id.* at 39-40. Even in the latter case, appellees argue that the state should be required to second-guess the Attorney General's determination by presuming that it may be unconstitutional. *Id.* at 40.

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ment. Placing a decisionmaker on the stand is therefore 'usually to be avoided.'" 429 U.S. at 268 n.18 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). Under appellees' proposed rule, by contrast, such inquiries will become commonplace, so as to determine the "motivating" or "fundamental" basis for the legislature's redistricting plan, and to assure that state legislators have not created districts with reference to the voting power of racial, ethnic or religious groups. Of course, the search for supposedly illicit group-based redistricting considerations conflicts with this Court's frequent observation that redistricting routinely involves the consideration of racial, ethnic, religious, and other group characteristics. *See Davis v. Bandemer*, 478 U.S. 109, 147 (O'Connor, J., concurring in the judgment). As we discussed at pp. 14-15 and n.16 of our Brief, the very structure and reasoning of *Shaw* establish that the *Washington v. Davis/Arlington Heights* line of cases is not dispositive of the constitutional claim asserted by the plaintiffs here.

Appellees could hardly propose a better recipe for destroying voluntary compliance with the Voting Rights Act while simultaneously depriving states of any practical means to avoid litigation over their redistricting plans. As we explained in our principal brief, the law is to the contrary. Indeed, appellees' arguments, if accepted, would establish that *Wygant v Jackson Bd. of Educ.* was wrongly decided, which is probably why appellees devote so little attention to that decision.

Appellees claim that permitting race-conscious state action in the absence of an actual violation of federal law would establish an unprecedented "good-faith" defense in constitutional cases. But this Court has already ruled in *Wygant* that a court is *not* required to "make an actual finding of prior discrimination based on the [state actor's] proof" before race-conscious action will be upheld. *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in judgment). This holding recognizes the practical reality that states will often be the front-line interpreters of federal anti-discrimination statutes, and that their compliance with anti-discrimination laws will be chilled if federal courts are too eager to second-guess a state's judgment as to the existence of a factual predicate for remedial action. *Id.* at 290 (O'Connor, J., concurring in part and concurring in judgment) (recognizing "the value of voluntary efforts to further the objectives of the law") (citation and internal quotations omitted).[12] As former Attorney General William French Smith stated in congressional hearings on the extension of the Voting Rights Act in 1982:

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[12] Indeed, in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), this Court approved a gender-based promotion decision although the District Court had found that gender was the determining factor in the decision and had found no actual past discrimination against women by the employer. 480 U.S. at 625; *see id.* at 659 (Scalia, J., dissenting). *Johnson* also expressly recognizes the concept of "breathing room" for voluntary efforts to assure compliance with anti-discrimination laws, *id.* at 645 (Stevens, J., concurring), the very concept appellees dismiss out of hand.

> [I]t is imperative that we not lose sight of the fact that, while the Voting Rights Act was enacted in part as a prophylactic safeguard against racial discrimination in certain jurisdictions having a history of discrimination in voting, it had another and more critical purpose as well, which was forward-looking and constructive in nature. That purpose was to encourage States and localities to bring blacks and other racial minorities into the mainstream of American political life.[13]

A. Section 2 Provided a Compelling Basis for Act 1.

Appellees trumpet the district court's finding that "'the State cannot clear the first *Gingles* hurdle', compactness." Br. at 46. But appellees, like the district court, totally disregard the case law establishing that districts satisfy *Gingles* 1 if they are not materially stranger in shape than other districts the state has drawn. La. Br. at 34 & n.40. Based on the previous configurations of the old 8th District, Louisiana had, at the very least, a firm basis for believing that District 4 could satisfy that standard. Appellees offer instead only Judge Walter's eyeball test: "It's not compact to the eye of this beholder."[14] The deficiencies of such a subjective test demonstrate precisely why the first *Gingles* factor is properly interpreted in light of the district configurations the state itself has employed. There is simply no good reason to impose a stricter test of compactness for black majority districts than for white majority districts.[15]

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[13] *Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary on Bills to Amend the Voting Rights Act*, 97th Cong., 2d Sess. 68-69 (1982).

[14] Appellees repeatedly invoke the "clearly erroneous" constraint upon appellate review of the district court's findings of fact (App. Br. at 14, 15, 28, 29, 30, 47), but they ignore what this Court made clear in *Gingles* itself: "Rule 52(a) 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or finding of fact that is predicated on a misunderstanding of the governing rule of law.'" 478 U.S. at 79.

Moreover, there can be no serious dispute that voting in Louisiana is highly racially polarized. Appellees state that the district court expressly rejected Dr. Richard Engstrom's testimony on racially polarized voting in its 1993 decision on Act 42, but this statement is untrue and, indeed, appellees supply no citation for it. At the 1994 hearing on Act 1, the court expressly informed the Government that it was not necessary for Dr. Engstrom to testify regarding racially polarized voting, because the court was already convinced that a district with a 55% black population was necessary to permit black voters an opportunity to elect a candidate of their choice. Tr. 7/21/94 p.m. at 19 (as Judge Shaw said, "When you strike gold on something, stop digging).[16]

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[15] There is no basis for appellees' assertion that the district court might have been referring to testimony of Dr. Sam Hilliard when it erroneously stated that the State's expert termed District 4 noncompact. Dr. Hilliard gave no such testimony, and in any event he testified for the United States, not for the State. Dr. Hilliard, like all the other witnesses to discuss the subject, confirmed that District 4 corresponds with prior versions of old District 8 and the Red River corridor (J.A. 75), that the Red River valley contains a large minority population (J.A. 86), and that Act 1's districts make sense from a regional perspective (J.A. 79-82). *See also* Declaration of Rep. Joseph Accardo, Jr., State Ex. 16, J.A. 196: "District 4, as contained in House Bill 11 and Act 1, is similar to but in many respects more compact than the old eighth congressional district"; Declaration of Dr. Olethia Davis, U.S. Ex. 11, J.A. 226-27 (District 4 is functionally compact based on ease of transportation and communication within the district and unifying features of Red River and Mississippi River).

[16] Appellees never acknowledge that they were required to bear the ultimate burden of proving the unconstitutionality of Act 1 by demonstrating that the state's evidence did not support the existence of a remedial purpose; they simply ignore the district court's error on this point. J.S. App. 6; *see* La. Br. at 40-41.

B. Section 5 Provided a Compelling Basis for Act 1.

Appellees argue that the prospect of a Section 5 objection by the Attorney General can never provide a compelling justification to draw a majority-minority district; only an actual Section 5 objection will suffice. Of course, this is flatly inconsistent with *Wygant*. Furthermore, in their discussion of Section 5, appellees simply ignore the decisional law that holds that a redistricting plan may reflect discriminatory intent even in the absence of retrogressive effect. La. Br. at 36.

CONCLUSION

Act 1 is not the "sinister" legislation that Justice Harlan condemned in his immortal dissent in *Plessy v. Ferguson*, 163 U.S. at 563 (1896). It is rather the balanced judgment of a majority-white Louisiana Legislature, conscious of the federal Voting Rights Act and *Shaw v. Reno*, to accommodate the opportunity for minority representation in the halls of the United States Congress.

In the words of Alexander Bickel, "each district carved out by an apportionment measure represents a choice and a prophecy."[17] Those who see in Act 1 the seeds of apartheid are wrong; there is no evidence supporting such a prophecy.[18]

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[17] Alexander M. Bickel, *The Supreme Court and Reapportionment*, in REAPPORTIONMENT IN THE 1970s (N.W. Polsby ed. 1971) pp. 57, 63.

[18] *See* Bernard Grofman, Lisa Handley, & Richard G. Niemi, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 132 (Cambridge Univ. Press 1992):

> [T]here seems to be no factual basis for asserting that enforcement of the Voting Rights Act has led to an *increase* in racial polarization by making race a more salient feature of politics than it had been previously. Certainly Thernstrom (1987) provides no empirical evidence to support this claim.

A hundred years after *Plessy*, Louisiana firmly believes Act 1 is a constitutional choice open to its Legislature, resting on a competing prophecy:

> We have, since Madison, realized that people tend to act politically not so much as individuals as in groups; that they have opinions, preferences, and interests which vary in intensity and thus call for varying degrees of respect and forebearance on the part of others, even if those others constitute a majority . . . . We have realized, in short, that influence and even power should be distributed more widely than they would be in rigid adherence to the majoritarian principle . . . . We have striven, it may perhaps be said, not for a majoritarian, but for a participatory democracy, in which access to the process of government is continuously available to all groups. The sensible question to ask about any institution of government, therefore, is not whether it is purely majoritarian, but whether it tends to enhance minorities rule, whether it tends to include or to exclude various groups from influence, and whether, if it assigns disproportionate influence to some groups, they are the ones which are relatively shortchanged elsewhere, so that the total effect is the achievement of a balance of influence.

Alexander M. Bickel, *ibid* note 17 at 60-61.

This balance of influence, as Bickel saw it, *id.* at 72, applying Burke's "computing principle,"[19] is the precise constitutional aim of Act 1.

For the foregoing additional reasons, the judgment below should be reversed.

Respectfully submitted,

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11 April 1995

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[19] Alexander M. Bickel, THE MORALITY OF CONSENT 142 (1975):

> But if we do resist the seductive temptations of moral imperatives and fix our eye on that middle distance where values are provisionally held, are tested, and evolve within the legal order — derived from the morality of process, which is the morality of consent — our moral authority will carry more weight. The computing principle Burke urged upon us can lead us then to an imperfect justice, for there is no other kind.

(14) (14)

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Nos. 94-558 and 94-627

In the Supreme Court of the United States

UNITED STATES OF AMERICA, APPELLANT

v.

RAY HAYS, ET AL.

STATE OF LOUISIANA, ET AL., APPELLANTS

v.

RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

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1. We argue in our opening brief (Br. 14-20) that the district court erred in holding that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." J.S. App. 5a. While agreeing that race-conscious redistricting is not always subject to strict scrutiny, Br. 23-24, appellees nevertheless advocate a very

similar standard. Relying on *Village of Arlington Heights* v. *Metropolitan Housing. Dev. Corp.*, 429 U.S. 252, 266 (1977), appellees contend (Br. 19-20) that strict scrutiny is appropriate any time that race is "a motivating factor" in determining a district's boundaries.

As we have discussed in our opening brief (Br. 15-20), redistricting presents a unique setting for applying the Equal Protection Clause. In redistricting, States must reconcile the competing claims to political influence of different politically cohesive groups. Members of a racial minority often form such a competing group. If a State's intent to draw district lines to accommodate the interests of a politically cohesive racial minority always triggered strict scrutiny—while accommodating the interests of other politically cohesive groups did not—it would put racial minority groups at a severe competitive disadvantage in the redistricting process. Far from furthering equal protection goals, application of strict scrutiny whenever redistricting accommodates the political interests of racial minorities would seriously undermine those goals.*

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* The other cases relied upon by appellees do not support their view that strict scrutiny applies to any district created with race as a motivating factor. In *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), the municipal lines were bizarre and had the effect of depriving blacks of the right to vote in municipal elections. The claim at issue in *Wright* v. *Rockefeller*, 376 U.S. 52, 53-54 (1964) was that the district lines were irrational and had the effect of reducing the political power of a racial minority group. Appellees' assertion that, following this Court's decision in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), all of the district courts have held that strict scrutiny applies to any district created with race as a motivating factor is also incorrect. Besides the district court in this case, only one other

Application of appellees' proposed approach would also cause a dramatic increase in the number of redistricting plans subject to strict scrutiny. Guided by political considerations, a sense of fairness, or a desire to comply with the Voting Rights Act, jurisdictions at all levels of government often create majority-minority districts. Appellees' proposed approach would subject all those districts to strict scrutiny.

Appellees attempt to minimize the practical consequences of their position by claiming that in this case, the North Carolina case, and the Georgia case, strict scrutiny "was applied to only one district," and that "[e]ven in Texas, only three of that State's thirty districts were subjected to strict scrutiny." Br. 25 & n.4. That claim is misleading.

In this case, the district court applied strict scrutiny to only one Louisiana district. But that is only because the district court concluded that appellees did not challenge the majority-minority district in New Orleans. J.S. App. 41a. Had that

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district court has adopted that standard. See *Shaw* v. *Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), juris. statements filed, Nos. 94-923 & 94-924 (Nov. 21, 1994). The other three district courts have rejected that standard. See *Johnson* v. *Miller*, 864 F. Supp. 1354, 1371-1374 (S.D. Ga. 1994) (strict scrutiny applies when race is the overriding factor in the creation of a district), prob. juris. noted, 115 S. Ct. 713 (1995) (Nos. 94-631, 94-797 & 94-929); *Vera* v. *Richards*, 861 F. Supp. 1304, 1344-1345 (S.D. Tex. 1994) (strict scrutiny applies only to districts that reflect an extraordinary departure from the State's traditional redistricting practices), juris. statements filed, Nos. 94-805 (Oct. 31, 1994), 94-806 (Nov. 2, 1994) & 94-988 (Dec. 1, 1994); *DeWitt* v. *Wilson*, 856 F. Supp. 1409, 1411-1413 (E.D. Cal. 1994) (strict scrutiny applies only to dramatically irregular districts), juris. statement filed, No. 94-275 (Aug. 8, 1994).

district been challenged, it would have been subject to strict scrutiny under appellees' motivating factor approach. In North Carolina, both majority-minority districts were subjected to strict scrutiny by the district court, not just one. *Shaw* v. *Hunt*, 861 F. Supp. 408, 473-474 (E.D.N.C. 1994), juris. statements filed, Nos. 94-923 & 94-924 (Nov. 21, 1994). In Georgia, only one of the three majority-minority districts was subjected to strict scrutiny, but that is because the plaintiffs in that litigation challenged only one of the three districts. *Johnson* v. *Miller*, 864 F. Supp. 1354, 1359 (S.D. Ga. 1994), prob. juris. noted, 115 S. Ct. 713 (1995) (Nos. 94-631, 94-797 & 94-929). Had plaintiffs challenged all three districts, and had the court applied appellees' proposed test, all three majority-minority districts would have been subjected to strict scrutiny. *Id.* at 1366-1377.

In Texas, it is true that only three of the State's congressional districts were subjected to strict scrutiny. *Vera* v. *Richards*, 861 F. Supp. 1304, 1337-1344 (S.D. Tex. 1994), juris. statements filed, Nos. 94-805 (Oct. 31, 1994), 94-806 (Nov. 2, 1994) & 94-988 (Dec. 1, 1994). The court expressly found, however, that race was a motivating factor in 16 additional districts challenged by the plaintiffs in that case. *Id.* at 1325-1328. The court failed to subject those districts to strict scrutiny only because it limited strict scrutiny to districts that, in its view, reflected an extraordinary departure from the State's traditional redistricting practices. *Id.* at 1344-1345.

Appellees also do not discuss the California case. There, the State's redistricting plans for Congress, state Assembly, and state Senate "attempted to reasonably accommodate the interests of every 'functionally, geographically compact' minority group of sufficient voting strength to constitute a majority in a single-member district." *DeWitt* v. *Wilson*, 856 F. Supp. 1409, 1411 (E.D. Cal. 1994), juris. statement filed, No. 94-275 (Aug. 8, 1994). Had the court applied appellees' proposed standard in that case, it would have subjected virtually all of the 54 majority-minority legislative districts (14 congressional, 27 state Assembly, 13 state Senate) to strict scrutiny. See *Wilson* v. *Eu*, 823 P.2d 545, 580-596 (Cal. 1992). Because the court concluded that strict scrutiny does not apply when race is considered in the context of traditional redistricting principles, however, no California districts were subjected to strict scrutiny. *DeWitt*, 856 F. Supp. at 1415.

Faced with the difficulty of advocating a pure motivating factor analysis in the redistricting context, appellees ultimately retreat from that position to some extent. According to appellees (Br. 24), because "[m]embers of one race *can* * * * form a cohesive and compact community[,] * * * race may be a legitimate consideration in helping to determine the *boundaries* of a particular community." Thus, race can be a factor in determining district boundaries as long as it does not become "the touchstone for an electoral district." *Ibid.* At another point, appellees propose a slightly different formulation (Br. 34): Strict scrutiny is triggered when "the fundamental factor driving [a district] was race." As we have explained in our brief in *United States* v. *Johnson*, Nos. 94-929, 94-631 & 94-797, in addition to being too difficult to administer, a fundamental factor test is subject to the same objections as a motivating factor test: It would put politically cohesive racial minority groups at a severe disadvantage in the redistricting process, and it would also subject most majority-minority districts to strict scrutiny.

For those reasons, both of appellees' proposed standards are inappropriate. Instead, as we have argued, when a State intentionally creates a district in which members of a politically cohesive racial minority constitute a majority, that district is not subject to strict scrutiny unless it is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Shaw*, 113 S. Ct. at 2824.

In this case, there is overwhelming evidence that blacks in District 4 are politically cohesive. See U.S. Br. 29. District 4 is also not highly irregular or bizarre. U.S. Br. 22-26. Accordingly, District 4 should not have been subjected to strict scrutiny.

2. We argue in our opening brief (Br. 21) that the question whether a district is bizarre must be decided in the context of the practices of the State in which the district is created. The relevant inquiry is whether the district is bizarre when compared to other districts created through the State's traditional districting practices. Because District 4 resembles and is actually modelled on various versions of old District 8 (U.S. Br. 22), it is not bizarre within the meaning of *Shaw*.

a. Appellees do not appear to challenge our contention that the bizarreness inquiry is a comparative one. They contend instead that District 4 should be subjected to strict scrutiny because it differs from old District 8 in numerous respects (Br. 31-32). As the relevant maps demonstrate, however, the resemblance between District 4 and old District 8 is unmistakable. Both districts are located in the same general area of the State and both run in the same general direction along the Red and Mississippi Rivers. When compared to old District 8, District 4 is not at all bizarre.

b. As we explain in our opening brief, rather than using old District 8 as the benchmark for determining whether District 4 is bizarre in the context of Louisiana districting practices, the district court undertook an inquiry that was apparently based on its own views of proper redistricting criteria. The court found that District 4 is bizarre because, in the court's view, it is not sufficiently compact, splits too many parishes and large cities, and divides various political communities. See U.S. Br. 25-26.

Appellees do not defend most of the district court's bizarreness analysis. Instead, they seek to justify the district court's finding based entirely on the evidence that District 4 splits parishes and cities. See Appellees' Br. 29-30. But as we have noted (Br. 25), there is nothing remarkable about District 4's splitting of parishes and cities. Previous Louisiana plans have split as many as seven parishes and two major cities. *Ibid.*; State's Br. 27-28 & n.33. The fact that District 4 splits 12 parishes and two major cities does not constitute a sufficient departure from prior practices to justify a finding that District 4 is bizarre.

Appellees insist (Br. 29-30) that the difference is that this time parishes and cities were divided in order to help create a majority-minority district. As we have discussed, however, there is nothing suspect about an intent to create a district in which a politically cohesive minority constitutes a majority as long as the shape of the district does not depart dramatically from the State's districting practices.

Because the minority group members in District 4 are politically cohesive and the district is not bizarre under that standard, District 4 should not have been subjected to strict scrutiny.

3. We argue in our opening brief that even assuming strict scrutiny is applicable, the State's plan satisfies that standard because it is narrowly tailored to comply with Sections 2 and 5 of the Voting Rights Act. In deciding this question, the district court inquired into whether the failure to draw a second majority-minority district would actually violate Section 2 or 5. The relevant inquiry, however, is whether the State had a firm basis for believing that District 4 may have been necessary to comply with those statutory prohibitions. Application of that standard leads to the conclusion that the State established a compelling interest sufficient to justify District 4. See U.S. Br. 27-33.

Appellees argue (Br. 35-39) that the district court's actual violation standard is the correct one for judging the constitutionality of the State's plan. But as we have noted, this Court has already rejected the view that a State seeking to comply with federal nondiscrimination requirements must prove that its actions are actually required by federal law. U.S. Br. 27-28. Instead, this Court has made clear that the State may engage in race-conscious action when it has a firm basis for believing that such action may be required by federal law. See *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989), and *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (opinion of Powell, J.). The firm basis in evidence standard (rather than a standard requiring proof that an actual violation would have occurred) is appropriate in order to encourage voluntary compliance with federal nondiscrimination law. *Wygant*, 476 U.S. at 290-291 (O'Connor, J., concurring in part and concurring in the judgment). Appellees make no effort to reconcile their standard with *Croson* and *Wygant*.

Appellees argue (Br. 35-39) that the standard we propose immunizes constitutional violations so long as they are committed with a "pure heart." Under the standard we propose, however, a State's subjective belief that the Voting Rights Act may require a majority-minority district is not alone sufficient to justify the creation of such a district: However pure, the State's belief must also be objectively reasonable in light of the circumstances.

4. Appellees argue (Br. 39-49) that even under the standard we propose, a second majority-minority district is not justified by Section 2. As we have noted, however, the evidence shows that (1) blacks who live along the Red and Mississippi Rivers are politically cohesive, (2) whites in that area vote as a bloc against the candidates preferred by blacks, (3) the black community living along the Red and Mississippi Rivers is sufficiently large and compact to constitute a majority in a district, and (4) absent the creation of such a district, blacks would be very substantially underrepresented in the Louisiana congressional delegation when compared to their percentage in the State's population. See U.S. Br. 29-30. That evidence is sufficient to show that the State had a firm objective basis for its conclusion that a second majority-minority district was needed to comply with Section 2.

Appellees contend (Br. 46-48) that the district court's finding that the compactness requirement was not satisfied precludes any reliance on Section 2.

The district court's finding, however, was based on a subjective "eye of the beholder" test of compactness. See Appellees' Br. 47. That is not the right legal standard for judging compactness. As we have explained (Br. 29-30), the relevant inquiry is whether District 4 is reasonably compact in light of the State's traditional redistricting practices. Because District 4 is reasonably compact when compared to old District 8, it satisfies the compactness requirement. Appellees point to no evidence that would justify a different conclusion.

Appellees also contend (Br. 48-49) that there was insufficient evidence of racially polarized voting in Louisiana. But as we have shown, the evidence of polarized voting was overwhelming. See U.S. Br. 29. Appellees' assert (Br. 48) that the district court rejected the evidence presented by the United States' expert on that issue. In fact, however, the district court interrupted the examination of that expert to state that it was already convinced by his report that racial polarization existed and that further examination on that issue was therefore unnecessary. J.A. 67.

5. Appellees also argue (Br. 41) that the evidence was insufficient to justify the State's belief that a second majority-minority district was necessary to comply with Section 5. The evidence established, however, that (1) the State had impermissibly diluted minority voting strength in its 1980s congressional redistricting plan, (2) the Attorney General had objected to the State's recent Board of Elementary and Secondary Education plan on the ground that the State's failure to create a second majority-minority district reflected purposeful discrimination, and (3) the State had created majority-white districts in

prior congressional redistricting plans that were similar in compactness to District 4. See U.S. Br. 31; State's Br. 36-37. That evidence was sufficient to provide the State with a firm basis for believing that it would have difficultly satisfying its burden under Section 5 to show that its failure to create a second majority-minority district was free of discriminatory purpose.

Appellees' only response (Br. 41) is that none of the pieces of evidence noted above is sufficient by itself to prove that a plan with only one majority-minority district would have reflected purposeful discrimination. If the State had attempted to obtain preclearance for a plan with only one majority-minority district, however, each item of evidence noted above would not have been viewed in isolation. The question would have been whether the totality of the relevant facts raised an inference of purposeful discrimination. *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982). The State would, moreover, have had to shoulder the burden of proof on that issue. In those circumstances, the State's decision to comply voluntarily with Section 5 by drawing a second majority-minority district was entirely reasonable and supported by a strong basis in evidence.

6. Finally, we have argued (Br. 33-34) that the State could constitutionally draw a second majority-minority district in order to further its compelling interest in ameliorating the consequences that racially polarized voting continue to have on the opportunity for minority voters to elect candidates of their choice. Appellees contend (Br. 49) that because the district court found that the compactness requirement was not satisfied, there was no need for the court to address the State's asserted interest in

redressing the effects of racially polarized voting. As we have already discussed, however, the district court erred in concluding that the compactness requirement was not satisfied.

In addition, the assumption underlying appellees' position is that the only compelling interest that a State may assert is compliance with federal law. That assumption is incorrect. As we have explained (Br. 33-34), independent of its responsibilities under the Voting Rights Act, a State has a compelling interest in remedying the effects of racial discrimination within its borders. That interest fully justifies the State's decision to create a second majority-minority district.

* * * * *

For the reasons stated in our opening brief as well as those stated herein, the district court's judgment should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1995

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Nos. 94-558 and 94-627

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA,
Petitioner,
v.
RAY HAYS, *et al.*,
Respondents.

On Appeal from the United States District Court for the Western District of Louisiana

BRIEF OF THE NATIONAL BAR ASSOCIATION, THE NATIONAL BLACK CAUCUS OF STATE LEGISLATORS, AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Each of the *amici* is a national organization actively participating on behalf of its constituents.

The National Bar Association ("Association"), founded in 1925, is a professional membership organization which represents more than 21,000 African American attorneys, judges and law students in the United States. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. The Association has a particular interest in this case because of its belief in the protection of minority voting rights as a means of solving America's racial problems.

The League of United Latin American Citizens ("LULAC"), the nation's largest Hispanic organization, is concerned with advancing the civil rights and promoting the educational, economic and social well being of Hispanic Americans in the United States. Founded in 1929, LULAC has approximately 33,000 dues-paying members. LULAC has often appeared as plaintiff or *amicus* in litigation before this Court and in many other federal and state courts to vindicate the rights of minorities, particularly Hispanics, who are denied the full enjoyment of their constitutional rights.

In 1977, ninety African American state legislators founded the National Black Caucus of State Legislators ("NBCSL"). Today NBCSL represents some 540 members in forty-three states, the U.S. Virgin Islands and the District of Columbia. The primary mission of the NBCSL is to develop, conduct and promote educational, research and training programs to enhance the effectiveness of its members as they consider legislation and public policy issues which impact, either directly or indirectly, upon the "general welfare" of African American constituents within their respective jurisdictions.

SUMMARY OF ARGUMENT

This case involves two highly significant and controversial issues—race and the fundamental constitutional right to have meaningful participation in the political process by virtue of the vote.

The District Court Panel erred because this case implicates the Fifteenth Amendment's voting rights clause, not the Fourteenth Amendment's equal protection clause. To the extent the Fourteenth Amendment is applicable, District No. 4 is subject to intermediate scrutiny, not strict scrutiny. In this regard, District No. 4 presents none of the concerns associated with a racial classification or quota; thus heightened scrutiny is not triggered. Moreover, following the case of *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) intermediate scrutiny is the proper test to judge majority-minority voting districts.

Even if strict scrutiny is applied, pursuant to *Shaw v. Reno,* 509 U.S. ——, 113 S. Ct. 2816 (1993), compliance with the permissive provisions of the Voting Rights Act to create a second majority-minority district constitutes a compelling state interest. To hold otherwise would open the door to equal protection challenges in districts where there is a majority of any one race. Moreover, adherence to a traditionally shaped district clearly reflects respect for political subdivisions and satisfies the requirement for compactness as established in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and respect for traditional and historical boundaries as settled in *Reynolds v. Sims*, 377 U.S. 533 (1964).

ARGUMENT

I. FIFTEENTH AMENDMENT JURISPRUDENCE IS SUFFICIENT TO DETERMINE THE CONSTITUTIONALITY OF A REDISTRICTING PLAN ADOPTED PURSUANT TO THE VOTING RIGHTS ACT

Introduction

> ***Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.***[1]

This country has consistently struggled with the concept of justice as it relates to the governance and treatment of its people. While born to be the model democracy, the soul of America has toiled for over two hundred years to ensure its citizenry the fundamental constitutional right to vote. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). It is telling that the constitution has been amended on four separate occasions in an attempt to secure the right to vote. *See* U.S. Const. amend. XV, XIX, XXIV, and XXVI. In the struggle for the franchise, there can be no dispute that no other race or minority has been subjected to more obstructions—from grandfather clauses to the medievalist intimidation of life and limb—than African Americans. *See e.g.,* Dudley O. McGovney, *The American Suffrage Medley* (1949); Kirk Harold Porter, *A History of Suffrage in the United States* (1918).

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[1] *The Federalist* No. 51 at 324 (James Madison) (Clinton Rossiter 1961).

Specifically, with respect to Louisiana, this struggle has made its way to the chamber of this Court on numerous occasions. *See Beer v. United States,* 425 U.S. 130 (1976) (New Orleans city council member districts' reapportionment plan reflected African American voting strength); *South Carolina v. Katzenbach,* 383 U.S. 301, 308 n.2 (1966) (literacy test held unconstitutional, Louisiana on record as supporting such tests); *Louisiana v. United States,* 380 U.S. 145 (1965) (interpretation test held unconstitutional; citizenship test ordered postponed; monthly reports ordered on voting registration of African Americans); *Anderson v. Martin,* 375 U.S. 399 (1964) (placing "Negro" on ballot next to candidate's name held unconstitutional).

In fact, Louisiana's history of disenfranchisement of African Americans comprises the worst record this country has seen. *See United States v. State of Louisiana,* 225 F. Supp. 353, 363-97 (E.D. La. 1965); H.R. Rep. No. 439, 89th Cong., 1st Sess. at 12-17 (1965); S. Rep. No. 162, 89th Cong., 1st Sess. at 9-10 (1965). Given Louisiana's long history of disenfranchisement of African Americans, the Voting Rights Act of 1965, as amended ("Voting Rights Act") identified Louisiana, with a small number of other states, as appropriate for remedial action. Thus, the case at hand should be considered in light of the historic struggle for the fundamental right to vote.

A. The Fifteenth Amendment, by its Very Language, Applies to Redistricting Plans Compelled by the Voting Rights Act

The Fifteenth Amendment reads:

> SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the

> United States or any State on account of race, color, or previous conditions of servitude.
>
> SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

The Fifteenth Amendment, as recognized by this Court, has always been self-executing. *South Carolina,* 383 U.S. at 325; *see Guinn v. United States,* 238 U.S. 347 (1915). Indeed, this Court has firmly established that when Congress enacts a law to enforce the Fifteenth Amendment it "may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina,* 383 U.S. at 324. This Court has also recognized that Congress' authority to carry out the mandates of the Fifteenth Amendment is not limited to forbidding violations of the Fifteenth Amendment, but is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *South Carolina,* 383 U.S. at 327 (quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824) (Marshall, J.)). In this regard, the Voting Rights Act was enacted in 1965 to effectuate the purpose of the Fifteenth Amendment. S. Rep. No. 162, 89th Cong., 1st Sess. at 2 (1965).

The case before this Court arises from federal and state action taken in compliance with the Voting Rights Act, which was enacted by Congress as an expression of its remedial powers under the Fifteenth Amendment. Specifically, the U.S. Attorney General and the State of Louisiana worked together to intentionally create a second majority-minority Congressional district ("District No. 4") that would further allow African Americans residing in Louisiana to have a more meaningful vote at the Congressional level. *See Reynolds,* 377 U.S. at 554-55. The Respondents' claim that District No. 4's bizarre shape intentionally and disproportionately segregates voters by race. Mot. to Affirm at 1. This issue perforce invokes the Fifteenth Amendment, since it is the only constitutional provision specifically enacted to control those instances where race and franchise are both at issue. *Louisiana*, 380 U.S. at 156.

Consequently, the constitutional question is whether District No. 4 abridges or denies any citizen's right to vote based upon race, color, or previous conditions of servitude. Existing case precedent compels a finding that District No. 4 is permissible under the Fifteenth Amendment.

In cases where voters raised a racial segregation claim, this Court has indeed applied the Fifteenth Amendment. For instance, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), this Court ruled that a twenty-eight sided electoral district, which eliminated all but four of four hundred African American voters was unconstitutional under the Fifteenth Amendment.[2] In the present case, Respondents argue that District No. 4 is bizarrely shaped. Mot. to Affirm at 1. Unlike the electoral district in *Gomillion*, however, District No. 4 was not designed to exclude a race of voters thereby providing no other expression of their franchise. The redistricting plan in *Gomillion* resulted in the total exclusion of African Americans from the democratic process. In the case at hand, the composition of District No. 4 is 45% white and 55% African American. Thus, contrary to the facts in *Gomillion*, no particular race in District No. 4 has had its right to vote abridged or eliminated.

In *City of Richmond v. United States*, 422 U.S. 353, 371 (1975), this Court again applied the Fifteenth Amendment. Specifically, Fifteenth Amendment jurisprudence was applied to the city of Richmond's annexation plan, which reduced the percentage of African Americans eligible to vote in city elections. This Court reversed the lower court and found that African Americans' right to vote was neither denied nor abridged under § 5 of the Voting Rights Act,[3] inasmuch as African Americans' political strength was not undervalued or underrepresented. By stark contrast, District No. 4 is comprised of approximately 45% white voters and 55% African American voters. Indeed, District No. 4's configuration is similar in effect to the *City of Richmond* annexation, inasmuch as it reduced the African American population from 52% to 42%. The issue in *City of Richmond,* as it should be in this case, was whether any person's right to vote had been abridged or denied. In the case at bar the answer, based upon the holding in the *City of Richmond,* is no. Clearly the political strength of the affected group, white voters in District No. 4, is not undervalued or underrepresented, particularly when five out of seven of Louisiana's Congressional districts enjoy a white majority population.

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[2] In *Wright v. Rockefeller*, 376 U.S. 52 (1964), this Court again examined an allegation that voting rights were abridged based upon the segregation of the races. In that proceeding, bizarrely shaped Congressional districts separated races, yet the Court held that on the issue of race, the Petitioners had failed to meet their burden of proof. Thus, this Court in *Wright* did not decide whether the Fourteenth or Fifteenth Amendment controlled.

The conclusion that white Louisianans are neither undervalued nor underrepresented is further supported by this Court's ruling in *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 n.24 (1977) ("UJO"). In *UJO* this Court held that the rights of white voters residing in the majority-minority districts were not abridged because:

> [T]he white voter who as a result of the 1974 plan is in a district more likely to return a nonwhite representative will be represented, to the extent that voting continues to follow racial lines, by legislators elected from majority white districts. The effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts in the rest of the county. Of course, if voting does not follow racial lines, the white voter has little reason to complain that the percentage of nonwhites in his district has been increased. (citation omitted)

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[3] Voting Rights Act § 5 tracks the Fifteenth Amendment. *Beer*, 425 U.S. at 147, n. 4.

In sum, this Court recognized in *UJO,* that unlike the racial explosion of the franchise in *Gomillion,* the New York redistricting plan did not totally exclude the other racial group from participation in the political process.

It is clear that the Three-Member Panel in the Western District of Louisiana, from which this appeal originates, has misinterpreted *Shaw*; to that end, total consideration of the Fourteenth Amendment was employed to the exclusion of the Fifteenth Amendment. *See Hays v. State of Louisiana,* 862 F. Supp. 119 (W. D. La. 1994). The District Court Panel misinterpreted Justice O'Connor's suggestion that *Gomillion* and *Wright* may be more appropriately considered in the context of the Fourteenth Amendment's equal protection clause. *Shaw v. Reno,* 509 U.S. ——, 113 S. Ct. 2816, 2829-26 (1993). It would have been more instructive for the court below to have closely scrutinized the lineage of cases Justice O'Connor employs in her dictum to interpret *Gomillion* and *Wright.*[4] The failure of the court below to carefully scrutinize *Shaw* has resulted in the Three-Member Panel totally ignoring Fifteenth Amendment jurisprudence, which, if allowed to stand, would render the Fourteenth Amendment supreme over the Fifteenth Amendment. This result is inapposite to fundamental constitutional jurisprudence and interpretation.

Interestingly, Justice Harlan spoke to the fallacy of inflating the Fourteenth Amendment when he said:

> Had the Court paused to probe more deeply into the matter, it would have found that the Equal Protection

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[4] Neither *City of Mobile v. Bolden,* 446 U.S. 55 (1980), *Personnel Administrators of Mass. et al. v. Feeney,* 442 U.S. 256 (1979), nor *Whitcomb v. Chavis,* 403 U.S. 124 (1971) involved claims of race segregation, rather *Mobile* and *Whitcomb* involved dilution of voting rights, which O'Connor suggested *Shaw* was not such a case. *Shaw,* 1135 S. Ct. at 2829-30. Even more inapposite, *Feeney* involved a claim of gender discrimination.

> Clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures.

Reynolds, 377 U.S. at 590-91. (Harlan, J., dissenting) Justice Harlan recognized that the Fourteenth and Fifteenth Amendments to the Constitution were added for specific purposes. This Court in *Gomillion* and *City of Richmond* also respected the distinct missions of these amendments. Thus, consideration of majority-minority districts within the context of the equal protection clause works to nullify not only the remedial nature of the Voting Rights Act but also the import of the Fifteenth Amendment. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Fifteenth Amendment jurisprudence is not only sufficiently developed to ferret out actual racial segregation, such as in *Gomillion*, but also to comprehend whether: (i) an affected group's right to vote has been denied or abridged; or (ii) the affected group's political strength has been undervalued or underrepresented. *City of Richmond v. United States*, 422 U.S. 353 (1975); *see also City of Mobile v. Bolden*, 466 U.S. 55 (1980); *City of Rome v. United States*, 446 U.S. 156 (1980). Thus, there is no need to intertwine the Fourteenth Amendment with voting rights cases involving race, because Fifteenth Amendment jurisprudence has developed sufficient constitutional principles to handle issues involving race and voting.

Simply put, the test to establish a Fifteenth Amendment violation is whether a racial group has been totally excluded from the political process. In *UJO*, this Court concluded that the white voters in a majority-minority district had not been excluded from the political process because they had effective representation in other districts. In *Gomillion*, this Court understood that the elimination of all but four African American voters from an electoral district constituted total exclusion from the political process. Conversely, in *City of Richmond*, this Court realized that an annexation plan which reduced the population of African Americans from 52% to 42% did not result in their exclusion from the political process. In the case at bar, whites have 45% of the voting population in District No. 4. Accordingly, in light of the above case law, there can be no argument advanced that whites in District No. 4 have been excluded from meaningful participation in the political process.

The District Court Panel has committed judicial error by failing to consider the Fifteenth Amendment. No case, including *Shaw,* holds that the Fifteenth Amendment is no longer applicable in voting rights cases. To overlook this fatal flaw in the *Hays* District Court's decision will essentially vitiate the Fifteenth Amendment as well as the remedial aspects of the Voting Rights Act.

II. NOTWITHSTANDING THE FIFTEENTH AMENDMENT'S APPLICATION, FOURTEENTH AMENDMENT EQUAL PROTECTION JURISPRUDENCE WOULD COMPEL INTERMEDIATE SCRUTINY BE APPLIED TO DISTRICT NO. 4

A. The Three-Judge Panel Misinterpreted *Shaw*'s Discussion of Irregular Shape

The Three-Judge Panel erroneously concluded that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." *Hays,* 862 F. Supp. at 124. Employing strict scrutiny, the Three-Judge Panel found District No. 4 constituted a racial classification and therefore declared its formation violative of the Fourteenth Amendment's equal protection clause. *Id.* at 125. This ruling misapplies *Shaw* and is at odds with settled equal protection jurisprudence.

The Three-Judge Panel misinterprets *Shaw* as holding that strict scrutiny is to be applied to any irregularly shaped electoral district. To the contrary, Fourteenth Amendment jurisprudence requires the application of intermediate scrutiny to District No. 4.

Specifically, the Three-Judge Panel failed to comprehend that a *Shaw* claim is narrowly limited to specific circumstances, particularly when *Shaw* is considered in the context of *Wright.* In *Wright,* maps and oral evidence were introduced to prove that the newly created district constituted racial gerrymandering.[5] This Court, however, ruled that this evidence was insufficient to establish a racial gerrymandering cause of action. *Id.* at 55. Thus, strict scrutiny was not applied. This is consistent with Justice O'Connor's interpretation of *Wright* which suggests that when a race of people lives in one community, a reapportionment plan which concentrates this race in one district may be legitimate. *Shaw*, 113 S. Ct. at 2826. Moreover, Justice O'Connor further concluded that *Wrights's* irregularly shaped district, which separated races to a significant extent, did not necessarily violate the equal protection clause based upon the compactness of the districts and maintenance of the integrity of political subdivision. *Id.*

Petitioners argue that District No. 4 follows the lines of the "old eighth" district thereby satisfying the history and traditional elements established in *Reynolds*. *Reynolds*, 377 U.S. at 578 (maintenance of political subdivisions recognized as legitimate state action). In addition, Petitioner asserts that the District No. 4 comports with the state's districting practices. Sol. Gen. J.S. at 19 (Sept. 26, 1994). Respondents contend that District No. 4 fails the compactness requirement because it is 250 miles long. Mot. to Affirm at 17. But other districts in the current state plan are also long. Opp'n to Mot. to Affirm at 6-7 (Nov. 18, 1994). Moreover, "[i]t is similar to previous districts drawn by the state in the geographic area." *Id.* It is also comparable in its length to other districts drawn by the state in this very plan. *Id.* The *Hays* Court failed to consider these factors in the context of their finding that District No. 4 is bizarre. Thus, the Three-Judge Panel committed judicial error by failing to consider applicable law.

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[5] This ruling was also made in spite of "statistics [showing] that the Eighteenth District contained 86.3% Negroes and Puerto Ricans; the Nineteenth, 28.5%; the Twentieth, 27.5%; and the Seventeenth, 5.1%." *Id.* at 54.

The Three-Judge Panel also failed to carefully consider *Shaw* in light of the import of *UJO*. *UJO* held that the purposeful use of race in the creation of a majority-minority electoral district did not violate the equal protection clause. Justice White, writing for this Court in *UJO*, 430 U.S. at 161 concluded:

> Implicit in Beer and City of Richmond, then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. That proposition must be rejected and § 5 held unconstitutional to the extent if we are to accept petitioners' view that racial criteria may never be used in redistricting or that they may be used, if at all, only as a specific remedy for past unconstitutional apportionments. We are unwilling to overturn our prior cases, however. Section 5, and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color, are constitutional. *Contrary to petitioners' first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment. Nor is petitioners' second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting of apportionment.* (footnote omitted) (emphasis added).

Indeed, Justice O'Connor acknowledged that race consciousness is not always race discrimination. *Shaw*, 113 S. Ct. at 2826. She distinguishes *UJO*'s sanctioning of a majority-minority race conscious district, however, as a case involving vote dilution. *Id.* at 532. Thus, Justice O'Connor concludes that *UJO* did not overrule the racial classification cases of *Wright* and *Gomillion*. In *Wright* and *Gomillion* the shape of the districts were highly bizarre. In *Wright*, Justice Harlan described the reapportionment plan as having zigzagging and tortuous boundaries. *Wright*, 376 U.S. at 58. Whereas in *Gomillion* the district was twenty-eight sided. *Gomillion*, 364 U.S. at 341.

Justice O'Connor properly identifies *Gomillion* as a case in which redistricting was accomplished for the purpose of segregating African Americans from an electoral district. In *Gomillion*, a redistricting plan resulted in a twenty-eight sided electoral district which excluded all but four of four hundred African Americans.[6] By identifying the purposeful use of race in irregularly shaped districts to segregate voters by race, Justice O'Connor elevated the new equal protection claim to that of a *Bakke*-type quota. Richard H. Pildes and Richard G. Niemi, *Expressive Harm, 'Bizarre Districts' and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno,* 92 Mich. L. Rev. 483, 504-16 (1993).

The significance of the ruling in *Gomillion*, and its inherent limitations, was completely misunderstood by the Three-Judge Panel below. A failure to have a truly compact district which can be identified and isolated to one small area is not a signal that the redistricting plan, in and of itself, should fail. Both of these concepts are relative in their terminology and usage.[7] As the record shows, the Justice Department argues that Congressional District No.

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[6] "Segregation" and "apartheid" should never be used lightly nor outside their specific context. To use these words out of context is to belittle the struggle for human rights, including voting rights in Louisiana, which gave rise to the terminology. As Nobel Leaureate, Elie Wiesel, persuasively attests, the term holocaust (in which six million Jews were systematically murdered) cannot be directly compared to any other human experience.

[7] As Richard H. Pildes and Richard G. Niemi in *Expressive Harms, 'Bizarre Districts' and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno,* 92 Mich. L. Rev. at 541 (1993) state:

> . . . the language of 'appearance' obscures the fact that districts might be oddly shaped along several different dimensions. In the absence of a clear conceptual understanding of what dimensions of district appearance are relevant, the basis for judging districts will be unclear. Different observers will find different aspects of the districts to be troubling.

4's shape is not dispositive of either racial intent or compactness. Instead of analyzing District No. 4 in light of cases such as *Gomillion* and *Wright*, the majority in *Hays* filled its decision with loosely worded rhetoric. Thus, the Three-Judge Panel was in error. Accordingly, the *Hay's* Panel inappropriately applied strict scrutiny to District No. 4, which is inconsistent with *UJO*.[8]

Instructive to the case at bar is Justice Stevens' dissent in *Shaw*, which stated that the equal protection clause does not impose any requirement that a Congressional district must be compact. *Shaw*, 113 S. Ct. at 2843-44. Nor does the equal protection clause, suggests Justice Stevens, prevent a state from purposely drawing a Congressional district to benefit a group belonging to a minority race.[9] *Id.* Significantly, he explains that:

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[8] More recently, in *Metro Broadcasting*, this Court also applied intermediate scrutiny to Congressionally mandated remedial acts which employed race-based classifications. Specifically, this Court in *Metro Broadcasting* used intermediate scrutiny to uphold a Congressionally mandated affirmative action law which promoted racial diversity in the communications field. *Metro Broadcasting v. FCC*, 497 U.S. 547, 564-65 (1990).

[9] If the equal protection doctrine is applied in this case, the doctrine should be found to require upholding District No. 4 as the second majority-minority Congressional district in Louisiana. In 1976, the Court upheld a reapportionment plan for New Orleans which made African Americans the voting majority in one district and the population majority in another. *Beer*, 425 U.S. at 142. The Court concluded that given the evidence of racial voting blocs, it was probable that one or two African Americans would be elected to the city council. *Id.* Thus, in a city where the populace elected five councilmembers by district and two in at large elections, and the African American population was 35%, the possibility that two African Americans could be elected to the city council showed that the reapportionment plan met the mandates of the Voting Rights Act. *Id.* In 1995, justice similarly requires that Louisiana's second majority-minority Congressional district, District No. 4, be found constitutional. Where there are seven Congressional districts in Louisiana, (a state which has denied African Americans the right to vote for most of the state's history), African Americans (who constitute 28% of the voting age population) should be provided with a meaningful opportunity to select the candidate of their choice

> The duty to govern impartially . . . is not violated when the majority acts to facilitate the election of a member or a group that lacks such power because it remains underrepresented in the state legislature—whether that group is defined by political affiliation, by common economic interests, or by religious, ethnic, or racial characteristics.

Id. at 2844.

Critical to Justice Stevens' analysis of invidious intent is the idea that the majority acts to its own detriment to benefit the minority. The gravamen of Stevens' argument recognizes the strength of the majority in comparison to the minority and that the minority relies upon the majority for fair treatment. This imbalance of power clearly controls whether an equal protection violation can be brought to bear in those instances. The beneficent action of the majority is dispositive of a benign purpose—which is inapposite to the purpose underlying the invidious discrimination demonstrated in *Hirabayashi v. United States,* 320 U.S. 81 (1943). Under Justice Stevens' approach, District No. 4 would be upheld since it is the State of Louisiana acting for the benefit of its African American constituents.

In light of *UJO* and *Gomillion,* District No. 4 does not constitute a racial classification sufficient to require strict scrutiny. There are none of the characteristics of exacting political expulsion, as was present in *Gomillion.* Conversely, similar to the districts in *UJO,* District No. 4 was created to provide minority voters with a meaningful opportunity for participation in the political process. The *Hays* Panel failed to properly consider this case law when rushing to the conclusion that District No. 4 con-

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in two of the seven districts. "Legislators represent people, not trees or acres . . . . [T]he right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds,* 377 U.S. at 562. African Americans in Louisiana need District No. 4 to secure their voting rights. More importantly, this Congressional district will lessen racial polarization and racial stigmas, creating a strong, equitable democracy.

stituted a racial classification. Thus, the lower court inappropriately applied strict scrutiny.

B. District No. 4 is not an Antecedent to Stereotyping, Stigmas, and Racial Polarization

In contrast to Justice Stevens, Justice O'Connor is concerned that overt state action, whether or not it benefits minorities, leads to stereotyping, stigmas and racial polarization. Justice O'Connor in *Shaw,* 113 S. Ct. at 2824-25, states that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite hostility." *Id.* at 2825. Justice O'Connor also extends these premises to maintain that a reapportionment plan can be "so irrational on its face that it immediately offends principles of racial equality." *Id.* at 2829. Justice O'Connor cites *Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267 (1986), and *Regents of the Univ. of California v. Bakke,* 438 U.S. 265 (1978), for the proposition that the use of race in remedial measures produces negative consequences.

Neither *Bakke, Wygant,* nor *Croson* are instructive with respect to the impact a majority-minority Congressional district will have upon race relations or upon the favored race's self-esteem. More importantly, none of these cases involve voting rights. Justice Souter, dissenting in *Shaw,* recognized that in contrast to the context of *Croson* (competitive bidding contracts) and *Wygant* (teacher layoffs), a state's drawing of electoral districts almost always "require[s] some consideration of race for legitimate reasons where there is a racially mixed population." *Shaw,* 113 S. Ct. at 1845.

Indeed, in the context of voting rights, this Court in *UJO* spoke directly to the issue of stereotypes, stigmas, and race relations. Justice White announced the decision of the Court. Importantly, Justices Stevens and Rehnquist, joined with Justice White's ruling that:

> There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful

> manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.

UJO, 430 U.S. at 165. Empirical studies support *UJO*, and further palliate the validity of using *Bakke, Wygant,* and *Croson* in the context of voting rights.

Importantly, consider a general maxim concerning prejudice as set forth by a group of psychologists from San Diego University:

> [D]iscriminatory behaviors are more likely to be seen as evidence of prejudice when directed toward members of less powerful groups than when directed toward members of more powerful groups.

Miriam J. Rodin, Judy M. Price, Jeff B. Bryson, and Francisco J. Sanchez, *Asymmetry in Prejudice Attribution*, 26 J. Exper. Soc. Psy. 481, 482 (Mar. 3, 1989). The authors of *Asymmetry in Prejudice Attribution* go on to conclude that "the asymmetry effect in prejudice attribution occurs because discriminatory behaviors produce an inference of greater ill-will when enacted by members of more empowered groups, and a perception that these behaviors cause greater harm to members of the less empowered groups." *Id.* ăt 503. District No. 4's creation is not the result of racial majority taking advantage of a political or racial minority. Consequently, the circumstances by which stigmas and stereotypes are advanced are not present.

C. District No. 4 is Beneficial Because it Includes Traditionally Excluded Minorities into the Political Process

Louisiana Congressional District No. 4 is beneficial inasmuch as it includes minorities more directly in the democratic/political system while not excluding from or diluting the strength of any race.[10] Inclusion of racial diversity and balance in Louisiana Congressional District No. 4 is in stark contrast to the cases in which whites excluded minorities from the political process. *See e.g., Guinn v. United States,* 238 U.S. 347 (1915) (invalidation of grandfather clauses); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (boundaries drawn to exclude all but four of four hundred African American voters). Clearly, there is a significant difference between cases in which whites exclude minorities, and this case in which the majority (the U.S. Congress, U.S. Attorney General and State of Louisiana) is including African Americans more directly and meaningfully in the democratic process.

Inclusion of minorities into the American fabric is at the heart of *Brown v. Board of Education,* and the line of anti-segregation cases that followed. Inclusion of African Americans in the democratic process will lessen stereotypes and racial polarization; it will grant an opportunity for an important and unique voice to be heard and understood, as well as important issues to be addressed and understood.[11] District No. 4 presents none of the racial stereotyping, stigmas or polarization concerns which would require heightened scrutiny. Accordingly, legal precedent demonstrates and empirical studies suggest that in the context of voting rights, *Bakke, Wygant,* and *Croson* provide no support for rejection of District No. 4.

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[10] There is no racial quota involved here inasmuch as there is no guarantee that District No. 4 will necessarily correlate to the election of a minority to Congress. Given the nationwide malaise toward voting, there is no guarantee that on election day minorities will turn out in sufficient numbers to vote as a majority. Ronald Smothers, *The South; Blacks Feel Like Wallflowers As No Candidates Woo Them,* The New York Times, A1 (Feb. 29, 1992). Furthermore, because of the significant difference in the cycles of political alienation between whites and African Americans, there is a very good chance in District No. 4, (which is 55% African Americans and 45% white), that whites may constitute the majority of voters. Cedric Herring, James S. House, and Richard P. Mero, *Racially Based Changes in Political Alienation in America,* 72(1) Soc. Sci. Q. 128 (March 1991).

[11] Although it is clear that whites have difficulties accepting changes which benefit minorities, it is equally as clear that this initial discomfort should be replaced with a better understanding of minority issues and concerns, as well as understanding why measures such as majority-minority districts are necessary. Cardell

Nothing surrounding the creation of District No. 4 would compel an equal protection strict scrutiny analysis. The use of race was not motivated by the racial stereotypes or stigmas that were condemned in *Gomillion* and *Brown v. Board of Educ. (Brown I),* 347 U.S. 483 (1954), or led this Court to reach the decision it had centuries ago in the *Dred Scott* or *Plessy v. Ferguson* decisions. *Dred Scott v. Sanford,* 60 U.S. (19 How.) 393 (1857); *Plessy v. Ferguson,* 163 U.S. 537 (1896). Consequently, when the facts surrounding the creation of District No. 4 are considered within the context of *UJO, Wright* and the *City of Richmond,* only an intermediate level of scrutiny is required.

III. EVEN IF STRICT SCRUTINY IS APPLIED TO THE REDISTRICTING PLAN, COMPLIANCE WITH THE FEDERALLY MANDATED VOTING RIGHTS ACT, WHICH WAS ENACTED PURSUANT TO § 2 OF THE FIFTEENTH AMENDMENT, CONSTITUTES A SUFFICIENT COMPELLING STATE INTEREST

Assuming *arguendo* that strict scrutiny applies to this case, a compelling interest must be established in order to uphold District No. 4. Respondents argue that no compelling interest exists for the creation of District No. 4, yet, Respondents concede that compliance with a mandatory provision of the Act constitutes a compelling in-

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K. Jacobson, *The Bakke Decision,* 27(4) J. Confl. Resol. 687, 690-91 (Dec. 1983); T. Alexander Aleinikoff, *A Case for Race-Conciousness,* 91 Colum. L. Rev. 1060, 1091-1093 (1991) (quoting Randell Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate,* 99 Harv. L. Rev. 1327, 1331 (1986)); Jon Hurwitz and Mark Peffley, *Traditional Verse Social Values As Antecedents of Racial Stereotyping and Policy Conservatism,* 14(4) Polit. Beh. 395 (1992).

terest. Mot. to Affirm 22. More specifically, Respondents remain resolute in their assertion that compliance with various provisions of the Voting Rights Act, where not required, fails to constitute a sufficient compelling interest. *Id.*

Implicit in Respondents' argument, however, is the notion that there is no compelling state interest in the state's proactive compliance with a permissive provision of the Voting Rights Act. That is, if no further violation exists, then proactive compliance with the Voting Rights Act by the state no longer constitutes a compelling interest. While some support for this inference may exist in *Shaw* [12] the case cannot be read to stand for the proposition that compliance with a federally mandated statute, enacted pursuant to § 2 of the Voting Rights Act cannot constitute a compelling state interest.[13] Such a restrictive reading constitutes a misreading of *Shaw* and effectuates a significant change to the Voting Rights Act. Indeed, such a reading of *Shaw* would place this Court in the role of both the federal and state legislatures.[14]

As stated *ante*, the *Shaw* majority introduced the strict scrutiny test for redistricting plans that are "so bizzare on [their] face that [they are] 'unexplainable on grounds other than race.' " *Shaw*, 113 S. Ct. at 2825. This Court recognized in *Shaw* that compliance with the prescriptions of the various provisions under the Voting Rights Act would constitute a sufficient compelling interest.[15] Citing *Beer v. United States,* 425 U.S. 130 (1976) as support, Justice O'Connor acknowledged that compliance with the "nonretrogression principle" contained within § 5 exemplified a possible compelling interest. Stated in the positive, in *UJO* Justice White noted that "where reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority" the nonretrogression test was satisfied. *UJO*,430 U.S. at 159. And, citing this Court's decisions in *Wright* and *Reynolds,* Justice O'Connor further recognized that maintaining "the integrity of various political subdivisions" and providing for "compact districts" are sufficient compelling interests. *Shaw,* 113 S. Ct. at 2830. Nothing in *Shaw, Reynolds* or *Wright* suggests that this is the only violation possible under § 5 of the Voting Rights Act.

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[12] *Shaw*, 113 S. Ct. at 2830. ("But in the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits, and what is required.")

[13] The Court has clearly recognized that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 555.

[14] This Court has recognized that "State legislatures are, historically, the fountainhead of representative government in this country." *Reynolds*, 377 U.S. at 564. Moreover, in *Voinovich v. Quilter*, 507 U.S. ——, 113 S. Ct. 1149, 1156 (1993), Justice O'Connor recognized that "it is the domain of the States, not the federal courts, to conduct apportionment in the first place." *See also South Carolina*, 383 U.S. at 327 (under the Fifteenth Amendment Congress may act to the extent of its powers).

Relying upon recent decisions in the area of equal protection jurisprudence, Justice O'Connor further recognizes that "eradicating the effects of past racial discrimination" may constitute another compelling interest. *Shaw,* 113 S. Ct. at 2831. Indeed, Justice White explicitly acknowledged the remedial nature of the Voting Rights Act in *UJO.*[16]

Shaw clearly states that compliance with a federal statute constitutes a compelling interest. There is nothing in *Shaw* that indicates a proactive compliance stance or retroactive compliance stance (upon finding a violation) controls the characterization of the compelling interest. Consequently, creation of a second majority-minority district indeed can constitute a compelling interest. While Justice O'Connor cites to *Croson* and *Wygant* as instructive of the evidentiary requirements to support a compelling state interest, her reference to the cases can in no way be read so as to extinguish the concept that the permissive provisions in the Voting Rights Act, which permit states to proactively seek pre-clearance from the Attorney General or a Three-Judge Panel, are insufficient in and of themselves, to establish a compelling state interest.[17] Such a reading of *Shaw* would constitute an abrogation of various provisions in the Voting Rights Act.

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[15] "The States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Shaw,* 113 S. Ct. at 2830.

[16] Citing *South Carolina,* 383 U.S. 301 (1966), this Court stated:

> It is apparent from the face of the Act, from its legislative history, and from our cases that the Act itself was broadly remedial in the sense that it was 'designed by Congress to banish the blight of racial discrimination in voting . . . .'

UJO, 430 U.S. at 156.

In addition, in *Voinovich v. Quilter*, this Court recognized that states need not wait for a violation before complying with the Voting Rights Act. *Voinovich*, 113 S. Ct. at 1156-57. Any reading of the Voting Rights Act which denies states the ability to prospectively comply with the Voting Rights Act constitutes an abrogation of the permissive provisions contained within the Act absent the clear guidance of the Congress.[18] If this Court holds that such action fails the compelling interest prong, this Court will in effect undermine further efforts on the part of states to come into compliance with the Voting Rights Act on a prospective basis.

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[17] Section 5 of the Voting Rights Act establishes a state may may seek pre-clearance in order to determine that a "qualification, prerequisite, standard practice, or procedure will not have the effect of denying or abridging the right to vote on account of race or color . . . ." 42 U.S.C. § 1973c.

[18] Established jurisprudence clearly sets forth the power and authority of Congress in this particular realm. In *South Carolina v. Katzenbach*, this Court recognized the extent and reach of Congressional authority to fashion remedial legislation pursuant to the Fifteenth Amendment. Specifically, this Court rejected the petitioner's argument that Congress was limited to crafting general legislation prohibiting violations of the Fifteenth Amendment and that *courts* were empowered and obliged to create specific remedies to such violations. *South Carolina*, 383 U.S. at 327.

Justice Douglas, in *Hirabayashi,* recognized that a proactive stance towards creating a remedy is a compelling interest, particularly "where the peril is great." [19] Viewed in its proper perspective, and in light of the long history attendant to this state in obstructing sufferage rights for various segments of its citizenry, such an approach on the part of the state legislature makes good sense. Such an action, effectuating an effective and viable redistricting plan, should constitute a compelling interest—whether done for the first time *or* for the second time.[20] In *Beer,* this Court recognized that states are not required to wait for a violation to occur before taking action to address the issue of redistricting.[21]

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[19] In his concurring opinion in *Hirabayashi,* Justice Douglas recognized that a governmental entity need not wait for the harm to occur. *Hirabayashi,* 320 U.S. at 107 (". . . nor should the military be required to wait until espionage or sabotage becomes effective before it moves. . . . Certainly we cannot say . . . [the military] should have procrastinated.") It is interesting to note, that *Hirabayashi* is one of the few equal protection cases in which this Court found that the government acted pursuant to a compelling interest even though the compelling interest involved internment of Japanese-Americans during World War II *solely* upon the basis of their ancestry. This action was taken after the bombing of Pearl Harbor by the Japanese.

[20] Indeed, Louisiana has a historical context which predisposes it to complying with the Voting Rights Act in a proactive manner.

> "To be specific, the new remedies of the Act are imposed on three States—Alabama, Louisiana, and Mississippi—in which federal courts have repeatedly found substantial voting discrimination."

South Carolina, 383 U.S. at 327.

[21] By "prohibiting the enforcement of a voting procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent States from 'undo[ing] or defeat[ing] the rights recently won' by Negroes." *Beer,* 425 U.S. at 140 (citing H.R. Rep. No. 91-397, p. 8). Moreover, the Court went on to state that "Section 5 was intended to insure that [the gains thus far achieved in minortory political participation] shall not be destroyed through new

Ultimately, Respondents' argument relies heavily upon the racial composition of District No. 4. and the equal protection clause to provide a basis for challenging such a district. This approach suffers from three severe flaws. The first problem with this approach is the implicit subsumption of the Fifteenth Amendment into the Fourteenth Amendment, such that the race component of the Fifteenth Amendment no longer has any meaning as compared to the equal treatment component of the Fourteenth Amendment.

The second problem with such an approach is that it sets precedent for an equal protection challenge based upon the racial composition and complexion of a district. Accordingly, any district which involves such a racial composition is open to equal protection challenges by white and black inhabitants of the district. Thus, the minority constituents of a newly created majority white district could bring an equal protection challenge, arguing that the racial composition of the district violates their right to participate in a "color-blind electoral process." *Shaw*, 113 S. Ct. at 2827. This would in turn create a judicial and political quagmire with no clear solution in sight. It is only when Respondents' line of argument is carried to its logical conclusion that the flaws within the argument become manifest.

Third, Respondents' argument sounds like an attempt to cap the state's right to effectuate a remedy of this nature. Respondents' argument attempts to provide a sufficient basis for establishing a quota as to the number of majority-minority districts a state may create. This Court has stated repeatedly that it will not entertain implementation of racial quotas.[22] To that end, use of the equal pro-

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[discriminatory] procedures and techniques." *Id.* (citing S. Rep. No. 94-295, p. 9).

[22] *See e.g.*, *Bakke*, 438 U.S. at 289. ("The special admissions program is undeniably a classification based on race and ethnic background. . . . Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.")

tection doctrine to challenge compliance with the Voting Rights Act necessarily pits one constitutional amendment against the other in terms of the primary of the amendments. Such an action can only bring about the complete conflagration of jurisprudence in either sphere. Thus, the Court should reject Respondents' argument that permissive compliance with the Voting Rights Act fails to continue a compelling interest.

To further buttress Respondents' argument that no compelling interest exists in creation of a second district, Respondents inquire into whether a vote dilution violation exists under § 2 of the Voting Rights Act. Such a violation would provide a justification for creation of District No. 4. Mot. to Affirm 27. Advancing the first prong required under *Gingles v. Thornburg* to establish a dilution claim, Respondents argue that Petitioner failed to demonstrate that the minority group is sufficiency "geographically compact to constitute a majority in a single-member district.[23] *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986). Respondents advanced this argument based upon the district's contours which follow the length of the Red River. While Petitioner presented evidence that the district followed the shape of the previous district and other districts in the plan, the Three-Judge Panel was not persuaded by the evidence presented. The Panel found that the state failed to provide sufficient evidence as to the issue of compactness. Opp'n to Mot. to Affirm at 5-6.

While the shape and contours of the district have taken on primary significance *vis-a-vis Thornburg v. Gingles,* 478 U.S. at 49, the *Hays* Panel failed to take into consideration the underlying rationale driving the *Gingles* test. The

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(citations omitted). *See also, Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).

[23] Petitioners failed to raise the issue of whether District No. 4 satisfies the second and third prong of the *Gingles* test thus, this issue will not be addressed here. Opp'n to Affirm 6.

underlying rationale, determining the extent of integration of the community and its political strength, implies a reasonable standard which should be taken into consideration when making a determination of compactness. Moreover, *Gingles,* when considered in the context of earlier case law, does not impose an absolute standard of compactness.

The *Gingles* test was born out of this Court's attempt to give life to the Congressional intent of the subject provision of the Voting Rights Act. *Gingles,* 478 U.S. at 47 n.15. The gravamen of the compactness requirement was to keep *integrated* districts from being sifted and winnowed to form a new district to the detriment of the minority group within the population. *Id.* at 50. Thus, the compactness requirement had a dual role—to demonstrate vote dilution, and to indicate the degree of integration and political strength of the affected group present in the particular community. *See Growe,* 113 S. Ct. 1149 (1993) (applying *Gingles* test to single-member district claims of vote dilution).

Respondents assert that District No. 4 fails the compactness requirement simply because it is 250 miles long. Mot. to Affirm at 17. This argument goes solely to the geometric shape of the district and fails to consider the underlying rationale driving the decision in *Gingles* as stated above. If the size of the district were dispositive of compactness, reapportionment plans in agrarian and rural areas would fail simply based upon the square miles involved. Such a mechanical reading of the compactness requirement would sound a death knell for large districts. Nothing in *Gingles* can be read to impose a strict or absolute standard of compactness. In fact, in light of other dilution cases, *Reynolds,* and its progeny, *Lodge,* and *Wright*; the opposite reading bears more truth. Geographic compactness is a relative concept. That is, it is relative to the setting to which it is applied. Geographic compactness, as a concept, must have some elasticity. In light of the variety of settings to which this concept will be applied, this maxim holds particular weight. In an urban setting, strict geographical compactness sounds reasonable given the stricter confines of most municipalities. In a rural setting, the boundaries are far more relaxed than the urban setting, thereby requiring a somewhat relaxed standard of compactness. This is the lesson that can be gleaned from the dilution cases, and in particular *Reynolds*, and its progeny, *Lodge, Wright*, and *Growe*. These cases set forth the standards articulated in *Gingles*. As such, the requirement for compactness should be tempered against a reasonable standard that considers factors such as the nature of the area to be restricted and the historical context of settlement patterns in that state.[24]

This reading of *Gingles* is not without some support. In an earlier case, *Rogers v. Lodge*, 458 U.S. 613, 614 (1982) this Court upheld a lower court decision to split a "large predominantly rural county" where the plaintiffs established a vote dilution claim. The judicially created districts were established in order to remedy vote dilution which was exacerbated by the at-large election system. This case is instructive in that it dealt with an area "approximately two-thirds the size of the State of Rhode Island." *Id.*

In light of the Three-Judge Panel's misreading of *Shaw* and *Gingles* regarding the establishment of a compelling interest, this case should be remanded to the Panel for further evidentiary findings.

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[24] Voting rights jurisprudence following enactment of the Voting Rights Act clearly took into consideration the fact that ". . . legislatures prefer to follow traditional county and regional lines so that the demands of blatant partisanship will be tempered by the constraints of history and tradition." *Kirkpatrick v. Preisler*, 394 U.S. 526, 552 (1969) (Harlan, J., dissenting). However, this requirement as initiated in *Reynolds*, followed in *Kirkpatrick*, and its progeny, should not and cannot be blindly considered absent some temperance or constraints of reasonableness upon the principle.

CONCLUSION

For the reasons stated, this court should reverse the Western District of Louisiana's decision and uphold the creation of District No. 4.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

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v.

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On Appeal From The United States District Court For The Western District Of Louisiana

◆

BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION AND ACLU OF LOUISIANA IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION AND ACLU OF LOUISIANA IN SUPPORT OF APPELLANTS

◆

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (hereinafter "ACLU") is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has provided legal representation to minorities in numerous jurisdictions throughout the country, and has frequently participated in voting rights cases before this Court, both as direct counsel, *see, e.g., Holder v. Hall,* 114 S.Ct. 2581 (1994), *McCain v. Lybrand,* 465 U.S. 236 (1984), *Rogers v. Lodge,* 458 U.S. 613 (1982), *Hunter v. Underwood,* 471 U.S. 222 (1985), and as *amicus curiae, see, e.g., Davis v. Bandemer,* 478 U.S. 109 (1986). The ACLU is providing representation to the appellants in *Abrams v. Johnson,* No. 94-797, *prob. juris. noted,* 63 U.S.L.W. 3499 (Jan. 6, 1995). The ACLU of Louisiana is one of its statewide affiliates.

SUMMARY OF JUDGMENT

Affirmance of the decision below that race-conscious redistricting is always subject to strict scrutiny without regard to bizarre shape and that the state had no compelling interest in complying with the Voting Rights Act or in remedying past discrimination, would render constitutionally suspect or invalidate most of the congressional, state, and local redistricting plans in the South as well as in other parts of the nation. A generation of litigation and administrative action under the Act would be set aside that Congress, national administrations of both parties, and this Court have endorsed as appropriate efforts to remedy the exclusion of minorities from the political process. Existing majority-minority districts would be invalidated and given the fact that minorities have been elected almost exclusively in majority-minority districts, legislative bodies at the national, state, and local levels would become primarily white.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

The consideration of race in redistricting is not *per se* suspect and is different from the consideration of race in the allocation of scarce employment or contractual opportunities where an independent claim of entitlement exists. Any racial group may complain if its voting strength has been abridged, but a non-dilutive race-conscious redistricting plan injures no one. Congress has sanctioned the use of majority-minority districts and has concluded that they do not isolate voters or increase racial tension.

ARGUMENT

I. Affirmance Would Radically Alter the Established Understanding and Application of the Voting Rights Act

Affirmance of the decision of the three judge court that "[r]ace-conscious redistricting . . . is always subject to strict scrutiny," *United States v. Hays*, No. 94-558, Jurisdictional Statement Appendix at 5a (hereinafter "App."), would call into question the constitutionality of many, if not virtually all, of the redistricting plans – congressional, state, and local – currently in existence in the southern states targeted by the special preclearance provisions of

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[2] The existing plans, or those upon which they were based, invariably took race into account in creating majority-minority districts: (1) to remedy violations of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973; (2) as a settlement in Section 2 vote dilution law suits; (3) to resolve Section 5 objections by the Attorney General; (4) voluntarily to comply with the Voting Rights Act; or, (5) to insure racial inclusiveness in the affected legislative bodies.

While these plans would survive strict scrutiny under the existing precedents of this Court, assuming strict scrutiny were required because of the bizarre shape of any of the districts, many would be held unconstitutional under the analysis of the three judge court that Louisiana had "no compelling governmental interest" in complying with Sections 2 and 5 of the Voting Rights Act or in remedying past and continuing discrimination. App. at 6a-7a. Under the circumstances, affirmance would make subject to challenge the results of a generation of litigation and administrative action under Section 5 that successive Congresses, national administrations of both parties, and this Court have strongly endorsed as appropriate efforts to remedy the historic exclusion of racial minorities from the political process in the United States.

A. *Congressional Redistricting*. In the 1980s, majority black congressional districts were intentionally drawn in a number of the southern states to remedy discrimination in the redistricting process and to combat the chronic effects of racial bloc voting. In Louisiana, the majority black Second District was created in 1983 as a result of

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[2] The covered states, or portions thereof, are Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia. 28 C.F.R. § 51 (1991).

Section 2 litigation. A three judge court invalidated the state's previous plan because it "sunder[ed]" the black population in the New Orleans area into two districts, ensuring the blacks would be a majority in neither. *Major v. Treen,* 574 F. Supp. 325, 352 (E.D.La. 1983). The state enacted a race conscious remedial plan which contained a district that was 58.6% black, the Second, located wholly within the city of New Orleans. Richard L. Engstrom, Stanley A. Halpin, Jr., Jean A. Hill, and Victoria M. Caridas-Butterworth, "Louisiana," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* 120 (eds. Chandler Davidson and Bernard Grofman, 1994) (hereinafter *Quiet Revolution*).[3]

The Second District enhanced the opportunity of blacks to elect a candidate of their choice, but it was not a "safe" black district. Lindy Boggs, the white incumbent, defeated a black state court judge, Israel Augustine, in the 1984 election. Boggs retained the seat until she retired in 1990, whereupon William Jefferson, a black, was elected as her successor. *Id.*

In its 1990 congressional plan, Louisiana continued the majority black Second District basically in its 1983 form. The new Second "covers essentially the same geographic area as did old District 2 in the previous plan," and is 61% black. *Hays v. State of Louisiana,* 839 F. Supp. 1188, 1191, 1210 (W.D.La. 1993), *vacated and remanded on*

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[3] *Quiet Revolution,* a collaborative effort by 27 social scientists, historians, and lawyers funded by the National Science Foundation, is the most comprehensive and systematic study to date of the impact of the Voting Rights Act in the southern states covered in whole or in part by Section 5.

other grounds sub nom. Louisiana v. Hays, 114 S.Ct. 2731 (1994).[4]

Georgia's majority black Fifth Congressional District was created in 1982 after the three judge court for the District of Columbia denied Section 5 preclearance to the state's initial plan because of "conscious minimizing of black voting strength" in the metropolitan Atlanta area. *Busbee v. Smith,* 549 F. Supp. 494, 517 (D.D.C. 1982), *aff'd,* 459 U.S. 1166 (1983). The state accomplished the "minimizing" by splitting the black community into three separate congressional districts, insuring that blacks were a minority of voters in each district. 549 F. Supp. at 499.

To remedy the Section 5 objection, the state drew a new plan which deliberately concentrated the black community in the Atlanta area into a single district, the Fifth. Although the district was approximately 65% black, it was not a guaranteed or "ghetto" district for blacks as its critics claimed. 549 F. Supp. at 507. Wyche Fowler, a white Democrat, was elected from the district in 1982 and in 1984. Michael Barone and Grant Ujifusa, *The Almanac of American Politics 1984* 289 (1983); Barone, *supra, The Almanac of American Politics 1986* 345 (1985). Fowler ran for the Senate in 1986, at which time John Lewis, a black Democrat, was elected to the open Fifth District seat. Barone, *supra, The Almanac of American Politics 1988* 300 (1987).

In its 1990 congressional redistricting plan, Georgia made the decision to maintain the Fifth as a majority black district in the metropolitan Atlanta area. While the redistricting process was driven by a number of factors, the state's redistricting criteria included protecting incumbents, avoiding retrogression under Section 5, and preserving the core of existing districts. *Johnson v. Miller*, No. 194-008 (S.D.Ga. Sept. 12, 1994), slip. op. at 5, *prob. juris. noted sub nom. Abrams v. Johnson*, 63 U.S.L.W. 3499 (Jan. 6, 1995).

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[4] In its 1994 decision invalidating the majority black Fourth District, the three judge court approved the Second, noting that "[a] strong basis under *Gingles* does exist . . . to warrant the creation of a majority-minority district in the Orleans Parish region, where one has existed since 1983." Hays v. State of Louisiana, No. 92-1522 (W.D.La. July 29, 1994), App. at 9a n.5.

In Mississippi a majority black congressional district, the Second, was first created in 1984 as the result of Section 2 litigation. In finding a violation the three judge court noted that, because of racially polarized voting, blacks had an "unrealistic chance . . . to be elected in majority white voting population districts." *Jordan v. Winter*, 604 F. Supp. 807, 813 (N.D.Miss. 1984), *aff'd sub nom. Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984).

The court adopted an interim court ordered plan under which the Second District was 58.3% black. 604 F. Supp. at 814. The court acknowledged that its plan "does not provide a compact geographical configuration for the Second District." 604 F. Supp. at 815. However, it justified the plan on racial grounds, *i.e.*, it created a rural Delta-River district "with a black voting age population majority," and had "the least adverse impact on the black voting influence in the Fourth District." *Id.* at 814-15.

The Mississippi Second was not a "safe" or "segregated" black district. At the 1984 election, Webb Franklin, a white, won the seat defeating black state legislator Robert Clark. Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* 91 (1990) (hereinafter *Black Votes Count)*. Mike Espy, a black lawyer with roots in the Delta area, ran in 1986 and was elected, the first black member of Congress from Mississippi in this century. *Id.* In its 1990 redistricting plan, the state retained the Second as a majority black district composed of Delta and river counties. U.S. Census, *1990 Population and Housing Profile*; "Congressional District of the 103rd Congress," *C.O. Weekly Report*, V. 51, 3473, 3487 (hereinafter *Congressional Districts of the 103rd Congress*).

In the 1990s majority black congressional districts were intentionally drawn in Alabama, South Carolina, and Florida. In *Wesch v. Hunt*, 785 F. Supp. 1491, 1493 (S.D.Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 112 S.Ct. 1926 (1992), *Figures v. Hunt*, 113 S.Ct. 1233 (1993), the plaintiffs challenged the pre-existing plan in Alabama, under which all the districts were majority white, on one person, one vote and Section 2 vote dilution grounds. During the course of the litigation, the parties stipulated "that a significant majority African American Congressional district should be created." 785 F. Supp. at 1498. The three judge court accepted the stipulation without making a finding whether Section 2 required the creation of a majority black congressional district in Alabama, and adopted a court ordered plan containing a district, the Seventh, in which blacks were 67.5% of the population. 785 F. Supp. at 1581.

Similarly, in South Carolina plaintiffs challenged the state's congressional redistricting plan on one person, one vote and Section 2 grounds. *Burton v. Sheheen*, 793 F. Supp. 1329, 1367-69 (D.S.C. 1992).[5] The state conceded a one person, one vote violation and the parties agreed that any remedial plan should include a majority black congressional district.

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[5] Plaintiffs also challenged redistricting for the state house and senate. Plaintiffs appealed the court ordered plans for these two legislative bodies on the grounds that the three judge court failed properly to consider Section 2. This Court reversed and remanded *sub nom*. SRAC v. Theodore, 113 S.Ct. 2954 (1993).

In implementing a court ordered remedy, the court drew a majority black district, the Sixth, but without deciding "if the court was *required,* under existing legal principles, to create a majority-minority district." 793 F. Supp. at 1368. The court acknowledged that its districts "may stretch the concept of compactness," but justified its plan "[f]irst, and foremost," because it ensured compliance with the Voting Rights Act. 793 F. Supp. at 1368.

In Florida two majority black congressional districts (the Third and the Seventeenth), and a third minority congressional district (the Twenty-third) in which blacks and Hispanics combined were the majority, were intentionally drawn by a three judge court as a result of voting rights litigation. *De Grandy v. Wetherell,* 794 F. Supp. 1076, 1088 (N.D.Fla. 1992). Finding that the pre-existing plan violated the one person, one vote rule as well as Section 2, the three judge court implemented race conscious redistricting to ensure that its "plan does not dilute the votes of racial or language minorities." 794 F. Supp. at 1083.[6]

During the 1990s a combination of voluntary state action and Section 5 objections or threatened objections by the Attorney General also resulted in the intentional creation of majority-black districts. Louisiana drew a second majority black district (the fourth), under the "impression" that the Attorney General would not preclear a plan that did not include two majority black districts out of seven. *Hays v. State of Louisiana, supra,* 839 F. Supp. at 1196 n.21.[7] In Georgia, prior to any involvement by the Department of Justice, state officials made the decision to create a second majority black congressional district in addition to the existing Fifth. *Johnson v. Miller, supra,* slip op. at 21-2; Transcript Volume II, 113 (Testimony of Meggers). Following Section 5 objections by the Attorney General to its first two plans, the state created two new majority black congressional districts (the Second and the Eleventh).[8]

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[6] The Florida congressional plan has been challenged on constitutional grounds in Johnson v. Smith, No. 94-40025 WS (N.D. Fla.).

[7] As noted *supra* at n.4, the three judge court invalidated the Fourth District on equal protection grounds, but approved the race conscious majority black Second District.

North Carolina voluntarily drew a majority black district following the 1990 census. *Shaw v. Reno,* 113 S.Ct. 2816, 2819 (1993). After a Section 5 objection by the Attorney General, the state drew two majority black districts, the First and the Twelfth. 113 S.Ct. at 2820.[9] The threat of litigation or objections to preclearance by civil rights organizations were factors in the intentional creation of a second majority black district in Texas (the Thirtieth), *Vera v. Richards,* 1994 WL 484492 (S.D. Tex. Aug. 17, 1994),[10] and one in Virginia (the Third).[11]

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[8] The court in Johnson v. Miller, *supra,* slip op. at 1, invalidated the challenged Eleventh District on the ground that it violated the equal protection clause of the Fourteenth Amendment.

[9] White voters challenged the plan on constitutional grounds in Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd sub nom.* Shaw v. Reno, *supra.* On remand, the three judge court sustained the plan's constitutionality. Shaw v. Hunt, 1994 WL 457269 (E.D.N.C. Aug. 1, 1994, as amended Aug. 22, 1994).

[10] The court noted the testimony of George Korbel, director of litigation for Texas Rural Legal Aid and former regional director of the Mexican-American Legal Defense Fund, before a senate committee that unless an additional black congressional district were created "the reapportionment of the Congress is not going to pass the Department of Justice." *Id.,* slip op. at 17-8. The court invalidated portions of the Texas plan on equal protection grounds.

[11] Both the NAACP and ACLU indicated they would challenge the state's plan if the Governor "didn't increase black

If the mere fact of race-conscious redistricting, without regard to the bizarre shape of the district, is always subject to strict scrutiny, then every one of the congressional plans in the southern states covered by Section 5 would be constitutionally suspect. In addition, many if not all congressional plans in other regions containing majority-minority districts would similarly be presumptively invalid.

Nationwide, the number of majority black and Hispanic congressional districts doubled after the 1990 census from 29 to 52. U.S. Department of Commerce News, U.S. Bureau of the Census, Press Release, "Number of Congressional Districts with Black or Hispanic Majorities Doubles, Census Bureau Says," Revised, March 24, 1993; "Black-and-Hispanic-Majority Districts," *C.Q. Weekly Report,* July 10, 1993. Race can easily be identified as a factor in the construction of many of the districts located outside the South. *See, e.g., Hastert v. State Board of Elections,* 777 F. Supp. 634, 662 (N.D.Ill. 1991) (approving a congressional plan for Illinois creating "an Hispanic super-majority district" and preserving "three existing African-American districts"); *Arizonans for Fair Representation v. Symington,* 828 F. Supp. 684, 689 (D.Ariz. 1992) (creating one new majority-Hispanic district on the ground that it "comports with the requirements of the Voting Rights Act," and deliberately assigning Hopi and Navajo to different congressional districts); *Wilson v. Eu,* 1 Cal.4th 707, 823 P.2d 545, 550 (Cal. 1992) (creating five new majority-

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voting strength in the 3rd District." "NAACP and ACLU oppose redistricting plan," *The Virginian-Pilot,* November 22, 1991, D5; Bill Wasson, "Wilder plan expected to win Assembly OK," *The Richmond News Leader,* December 3, 1991, 1.

Hispanic congressional districts); *Mellor v. Mitchell*, 607 A.2d 204, 219 (Pa. 1992) (creating one new majority black congressional district).

B. *Legislative Redistricting*. Following passage of the Voting Rights Act, majority black state legislative districts were also deliberately created throughout the South. Two primary factors drove this process. First, states were required by the courts and/or Section 5 to abandon their use of multimember districts, at least in areas with substantial black populations, in favor of single member systems.[12] Courts and/or Section 5 objections invalidated, generally on minority vote dilution grounds, multi-member legislative districts in Alabama,[13] Georgia,[14] Louisiana,[15] Mississippi,[16]

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[12] Single member districts facilitate the construction of districts in which a minority is in the majority, and, as this Court has consistently recognized, enhance the minority's chances of electing candidates of its choice. Rogers v. Lodge, 458 U.S. 613, 616 (1982) (a minority "unable to elect any representatives in an at-large election, may yet be able to elect several representatives if the political unit is divided into single-member districts"); Voinovich v. Quilter, 113 S.Ct. 1149, 1155 (1993).

[13] Sims v. Amos, 336 F. Supp. 924, 936 (M.D.Ala. 1972) ("multi-member districts tend to discriminate against the black population"), *aff'd* 409 U.S. 942 (1972).

[14] Georgia v. United States, 411 U.S. 526, 530 (1973) (noting the Attorney General's objection to multimember districts because of their potentially "discriminatory racial effect on voting").

[15] Bussie v. Governor of Louisiana, 333 F. Supp. 452, 454 (E.D.La. 1971) (expressing approval of the Attorney General's objection to the state's plan, which contained multimember districts, and describing it as "racially discriminatory" and "employing gerrymandering in its grossest form"); Bussie v. McKeithen, 457 F.2d 796 (5th Cir. 1971).

[16] Connor v. Coleman, 425 U.S. 675 (1976); Connor v. Finch, 419 F. Supp. 1072, 419 F. Supp. 1089, 422 F. Supp. 1014 (S.D.Miss. 1976).

North Carolina,[17] South Carolina,[18] Texas,[19] and, Virginia.[20]

Second, states were required, again by the courts and/or Section 5, to draw district lines in a racially conscious manner to avoid diluting minority voting strength. *See* Lisa Handley and Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Office Holding in Southern State Legislatures and Congressional Delegations," in *Quiet Revolution* at 340 (states were required to change "from multimember to single-member districts" and "to redraw . . . lines so as not to fragment black voters").

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[17] Gingles v. Edmisten, 590 F. Supp. 345, 350-51 (E.D.N.C. 1984) (noting the Attorney General's objections to multimember districts in covered areas of the state), *aff'd sub nom.* Thornburg v. Gingles, 478 U.S. 30, 80 (1986) ("use of a multimember electoral structure [in uncovered areas] has caused black voters . . . to have less opportunity than white voters to elect representatives of their choice").

[18] U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After 217 (1975) (noting the Attorney General's objection to multimember districts in the house because of their tendency to submerge "significant concentrations" of black voters). After extensive litigation and Section 5 proceedings, *see* Morris v. Gressette, 432 U.S. 491, 495 n.4, 498 (1977), and South Carolina v. United States, 589 F. Supp. 757 (D.D.C. 1984), the senate adopted single member districts in 1984. Laughlin McDonald, "An Aristocracy of Voters: The Disfranchisement of Blacks in South Carolina," 37 S.C.L.Rev. 557, 578 (1986).

[19] White v. Regester, 412 U.S. 755, 773 (1973) (multimember districts "had the unconstitutional effect of minimizing the voting strength of racial groups") (Brennan, J., concurring).

[20] In the 1980s, following Section 5 objections by the Attorney General, the state adopted single member districts for both the house of delegates and the senate. Thomas R. Morris and Neil Bradley, "Virginia," in *Quiet Revolution* at 281-82.

Throughout the 1970s, 1980s, and 1990s, the Department of Justice repeatedly objected under Section 5 to the way lines were drawn in legislative redistricting plans in covered jurisdictions, whether they used multimember or single member districts. *See* U.S. Department of Justice, *Complete Listings of Objections Pursuant to Section 5 of the Voting Rights Act of 1965*, November 30, 1994 (hereinafter *Complete Listings of Section 5 Objections*). Since April 1, 1991 (through December 22, 1994), the Attorney General has objected to redistricting in Florida (senate), Georgia (house and senate), Louisiana (house and senate), Mississippi (house and senate), North Carolina (house and senate), South Carolina (house), Texas (house and senate), and Virginia (house). *Id.* Necessarily, race conscious remedial plans were drawn to cure the Section 5 objections. *See, e.g., Johnson v. De Grandy*, 114 S.Ct. 2647, 2652 N.2, 2663 (1994) (approving a plan which created "effective voting majorities" for blacks and Hispanics).[21]

C. *Local Redistricting.* The same pattern of remedial race-conscious post-Voting Rights Act redistricting is repeated in southern cities and counties. In Alabama, for example, between 1970 and 1989, 42 of the 48 cities with populations of 6,000 or more switched from at-large to district systems of elections. Peyton McCrary, Jerome A. Gray, Edward Still, and Huey L. Perry, "Alabama," in *Quiet Revolution* at 55. Vote dilution litigation caused 27 of the changes, and Section 5 objections by the Attorney General another four.[22]

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[21] Race-conscious legislative redistricting is commonplace outside the South as well. *See, e.g.*, DeWitt v. Wilson, 1994 WL 325414 (E.D.Cal. 1994) (approving the creation of majority-minority legislative districts in California); Voinovich v. Quilter, *supra*, 113 S.Ct. at 1153 (approving the creation in Ohio of "several legislative districts dominated by minority voters").

There was also a substantial shift by counties and school boards in Alabama from at-large to alternative systems. As with cities, vote dilution litigation was the main cause for the changes. *Dillard v. Crenshaw County, Ala.*, 640 F. Supp. 1347 (M.D.Ala. 1986); *Dillard v. Baldwin County Board of Education*, 686 F. Supp. 1459, 1461 (M.D.Ala. 1988); McCrary, *supra*, in *Quiet Revolution* at 54.

All of the remedial plans adopted in Alabama since passage of the Voting Rights Act may fairly be characterized as race-conscious. If race-conscious redistricting is always subject to strict scrutiny, virtually every one of these plans is constitutionally suspect and subject to immediate review by the federal courts.

In Georgia, as another example, vote dilution lawsuits were filed against 40 cities and 57 counties in the state between 1974-1990 challenging systems of at-large elections. Laughlin McDonald, Michael B. Binford, and Ken Johnson, "Georgia," in *Quiet Revolution* at 81. All but one of the cities, and 53 of the counties, changed to district systems containing majority black districts as a result of the litigation. Without question, all of the remedial redistricting plans, whether drawn by the courts or agreed upon by the parties, were race conscious, *i.e.*, districts were designed to contain "effective black voting majorities." *Id.* at 90.

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[22] Even the so-called "voluntary" changes often reflected direct awareness of the Voting Rights Act. The city of Attala, in adopting a single member plan in 1988, indicated that it was "sensitive to the Sec. 5 Preclearance Requirements of the Voting Rights Act." Attala City Council, Ordinance No. 612 (88); McCrary, *supra*, in *Quiet Revolution* at 409 n.146.

The chief demographer for the State of Georgia, who has drawn hundreds of redistricting plans at the state and local levels over the past two decades in the course of litigation or simply to comply with one person, one vote, testified in *Johnson v. Miller, supra,* that she had "never drawn a redistricting plan . . . that didn't take race into account." *Id.* at Transcript Volume II, 265 (Testimony of Meggers). She frankly conceded that "if taking race into account were unlawful . . . there is not a redistricting plan in the State of Georgia that would be valid." *Id.*

Scores of race-conscious local redistricting plans were similarly drawn in response to litigation or to comply with the Voting Rights Act in Louisiana,[23] Mississippi,[24] North Carolina,[25] South Carolina,[26]

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[23] *See* Engstrom, *supra,* in *Quiet Revolution* at 112-14 (describing the adoption of majority black districts in cities and parishes in response to Section 5 objections or litigation).

[24] *See* Frank Parker, David C. Colby, and Minion K.C. Morrison, "Mississippi," in *Quiet Revolution* at 138-39 (describing changes by cities between 1965 and 1989 from at-large to district based elections as a result of litigation or Section 5 objections). The attempt in Mississippi to *avoid* creating majority black districts in counties containing substantial black populations by changing from single member districts to at-large elections is discussed in Parker, *supra, Black Votes Count* at 51-54. *Also see* Allen v. State Board of Elections, 393 U.S. 544, 550 (1969) (requiring preclearance of Mississippi's post-Voting Rights Act law authorizing counties to adopt at-large voting).

[25] *See* William R. Keech and Michael P. Sistrom, "North Carolina," in *Quiet Revolution* at 171-72 (noting substantial changes from at-large to district elections and the creation of majority-minority districts for counties and cities in North Carolina between 1965 and 1991 induced by litigation, the threat of litigation, or voluntary compliance with the Voting Rights Act).

[26] *See* Orville Vernon Burton, Terrence R. Finnegan, Peyton McCrary, and James W. Loewen, "South Carolina," in *Quiet*

Texas,[27] and Virginia.[28] Nationwide, since April 1, 1991 (through December 22, 1994), the Attorney General has objected to 148 redistricting plans adopted in Alabama, Arizona, California, Georgia, Louisiana, Mississippi, New York, South Carolina, Texas, and Virginia. *Complete Listings of Section 5 Objections, supra.*

As is apparent, subjecting a plan to strict scrutiny merely because the jurisdiction took race into account or intended to create a majority-minority district would radically alter this Court's established interpretation and application of the Voting Rights Act. While *stare decisis* is not "an inexorable command," it

> is the preferred course because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

Payne v. Tennessee, 111 S.Ct. 2597, 2609 (1991). Affirmance would violate each and everyone of these concerns, and would extend *Shaw v. Reno* in a way this Court could not have contemplated.

Revolution at 207-12 (describing changes from at-large to race-conscious district elections for local jurisdictions in South Carolina brought about by litigation, Section 5 objections, and voluntary compliance with the Voting Rights Act).

[27] *See* Robert Brischetto, David R. Richards, Chandler Davidson, and Bernard Grofman, "Texas," in *Quiet Revolution* at 254-55 (discussing substantial changes from at-large to district elections for cities caused by litigation, the threat of litigation, or Section 5 objections.

[28] *See* Morris, *supra*, in *Quiet Revolution* at 284-85 (noting the creation of majority black districts for a number of counties and cities as a result of litigation or Section 5 objections).

II. The Consideration of Race in Redistricting Is not Inherently Suspect

The notion that race-conscious redistricting is stigmatizing, App. at 11, and should always be subject to strict scrutiny ignores the reality of the redistricting process. *See United Jewish Organizations of Williamsburg, Inc. v. Carey,* 430 U.S. 144, 165 (1977) (racial redistricting represents "no racial slur or stigma with respect to whites or any other race") (White, J., joined by Stevens and Rehnquist, JJ.). Legislators routinely make decisions in redistricting based on group characteristics, such as race and ethnicity. As the Court noted in *Gaffney v. Cummings,* 412 U.S. 735, 753 (1973), "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." *See Mobile v. Bolden,* 446 U.S. 55, 87 (1980) ("legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way") (Stevens, J., concurring in judgment); *United Jewish Organizations of Williamsburg, Inc. v. Carey, supra,* 430 U.S. at 176 n.4 ("[i]t would be naive to suppose that racial considerations do not enter into apportionment decisions") (Brennan, J., concurring). *See also* Allan J. Lichtman and J. Gerald Hebert, "A General Theory of Vote Dilution," 6 *La Raza L.J.* 1, 21 (1993) (redistricting authorities well know "[t]he relative locations of concentrations of minorities as well as their political proclivities"); T. Alexander Aleinkoff and Samuel Issacharoff, "Race and Redistricting: Drawing Constitutional Lines after *Shaw v. Reno,*" 92 *Mich.L.Rev.* 588, 607 (1993) ("[g]iven that racially polarized voting patterns are well documented, race and ethnicity will invariably be crucial demographic variables in redistricting decisions").

One of the essential purposes of legislative redistricting is to "reconcile the competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." *Davis v. Bandemer,* 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment). In *Arizonans for Fair Representation v. Symington, supra,* 828 F. Supp. at 690, for example, in fashioning a remedy the court deliberately placed Hopi and Navajo Indians in different districts because the tribes "did not want to be placed in the same district."[29]

The lower court in this case recognized that group characteristics, specifically religion and ethnicity, could properly form the basis for redistricting decisionmaking. In fact, it invalidated the Fourth District in part because it failed to take into account the "ethno-religious" divisions of the state and failed to place in separate districts "English-Scotch-Irish, mainline Protestants, traditional rural black Protestants, South Louisiana black Catholics, Continental French-Spanish-German Roman Catholics, sui generic Creoles, and thoroughly mixed polyglots." App. at 66a. To hold on the one hand that a plan is invalid because it failed to take the ethnicity of "English-Scotch-Irish" or "sui generic Creoles" into account, but to hold on the other that a plan is suspect because it took the race of African-Americans into account would impose an impermissible dual standard in redistricting and render the equal protection clause virtually meaningless.

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[29] The Census Bureau, of course, collects and widely disseminates bloc data by race under Pub.L. 94-171, 13 U.S.C. § 141(c). Although the statute does not mandate race data, it is provided because states request it for redistricting and for other governmental purposes. Congress and the states thus recognize that race is inherent in the redistricting process.

To be sure, a minority (whether black or white) in a district may always challenge a redistricting plan on statutory or constitutional grounds if its voting strength has been diluted. In such a challenge the plaintiffs would have the burden of proving that the plan was purposefully discriminatory, *Rogers v. Lodge, supra,* or had a discriminatory result. *Thornburg v. Gingles, supra.* But that is far different from holding that in the absence of proof of a discriminatory purpose or result a plan is constitutionally suspect merely because race was a factor in the redistricting process.

In *Thornburg v. Gingles, supra,* 478 U.S. at 50, the Court held that in proving a violation of Section 2, race *must* be taken into account in proposing an alternative redistricting plan to show that a minority could constitute a majority in a single member district. It would be irrational, and would amount to repeal of Section 2, to hold that a plan drawn to comply with *Gingles* was itself a constitutionally suspect racial gerrymander because it took race into account in showing that a minority was geographically compact.

Moreover, in *Holder v. Hall,* 114 S.Ct. 2581 (1994), a majority of the Court affirmed the continuing validity of Section 2 and rejected the contention that the Court's race-conscious Section 2 vote dilution jurisprudence was "repugnant to . . . the ideal of a color-blind Constitution." 114 S.Ct. at 2598 (Thomas, J., concurring in the judgment). *Id.* at 2588 ("*stare decisis* concerns . . . require me to reject Justice THOMAS' suggestion that we overhaul our established reading of § 2") (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2621 n.3 (the *Gingles* vote dilution analysis applies to "the case before us") (Blackmun, J., dissenting); *id.* at 2627 ("[i]t is crystal clear that Congress intended the 1982 amendment to cover non-access claims like those in *Bolden* and *Gomillion*) (Stevens, J., dissenting).

Under a non-dilutive race-conscious redistricting plan, whites are not injured and do not have an independent claim of entitlement, *e.g.*, to be overrepresented in a legislative body or to live in a district in which members of their race are the majority. It is the absence of harm that principally distinguishes redistricting cases from those involving the race conscious allocation of scarce employment or contractual opportunities to which strict scrutiny has been held to apply.

In *Wygant v. Board of Education*, 476 U.S. 276 (1986), preferential layoffs were subject to strict scrutiny because white teachers with greater seniority were laid off while minority teachers with less seniority were retained. The Court invalidated the layoff/retention scheme because the "burden is too intrusive" on third parties. *Id.* at 283. In *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989), a city's minority set aside was subject to strict scrutiny because it "denies certain citizens the opportunity to compete for a fixed percentage of public contracts." In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Bakke was injured because he was denied the chance to compete for all the openings in a medical school class. Certain places had been set aside for minority applicants, whom Bakke contended were less qualified than he.

In each of these cases whites were palpably injured or had an independent claim of entitlement – more seniority, acceptable bids for contracts, better qualifications – that was denied by a racial preference. But under a non-dilutive race-conscious redistricting plan, no person is injured or has an independent claim of entitlement.

In *Shaw v. Reno, supra,* 113 S.Ct. at 2826, the Court recognized that "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines." For that reason, race-conscious redistricting is subject to strict scrutiny only where it is conjoined with bizarre district shape, *i.e.*, where a plan on its face appears to be nothing more than an effort to segregate voters on the basis of race. *Id.* at 2824. *See* Richard H. Pildes and Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after *Shaw v. Reno,*" 92 *Mich.L.Rev.* 483, 495 (1993) ("*Shaw* is best read as an exceptional doctrine for aberrational contexts rather than as a . . . sweeping constitutional condemnation of race-conscious redistricting.").

III. Affirmance Would Purge Minorities from Office

Affirming the lower court in this case, *i.e.*, applying a presumption of unconstitutionality to redistricting plans in which race was a consideration without regard to bizarre shape and rejecting compliance with the Voting Rights Act and combating past and continuing discrimination as compelling governmental interests, would result in the wholesale invalidation of existing plans. It would also provide a strong disincentive for the maintenance of any existing majority-minority districts, as well as the creation of such districts in the future. These consequences would be devastating for minority office holding since minorities have been elected in the South – at the local, state, and national levels – primarily in majority-minority districts.

The principal conclusions of *Quiet Revolution* are:

> First, the increase in the number of blacks elected to office in the South is a product of the

> increase in the number of majority-black districts and not of blacks winning in majority-white districts. Second, even today black populations well above 50 percent appear necessary if blacks are to have a realistic opportunity to elect representatives of their choice in the South.

Handley, *supra,* in *Quiet Revolution* at 335-36. These findings are consistent with those of prior studies during the 1970s and 1980s comparing the success of black candidates in different election systems, which supported the common sense view that single member districts provided blacks greater electoral opportunities than at-large or multimember district systems. *See* Margaret Conway, *Political Participation in the United States* 185, 2d ed. Washington, D.C. C.Q. (1991) (summing up the scholarship and concluding that "there is persuasive evidence that the electoral structure has a significant, perhaps even dominant, impact on the extent of [minority officeholding]").

As an illustration of the findings in *Quiet Revolution,* of the 17 African-Americans elected to Congress in 1992 and 1994 from the 11 states of the old Confederacy, *all* were elected from majority-minority districts. *Congressional Districts of the 103rd Congress, supra;* "Minorities in Congress," *C.Q. Weekly Report,* Nov. 12, 1994. For minorities to win, it has almost invariably been necessary for them to run in districts with a majority-minority population.

The only black in the twentieth century to win a seat in Congress from a majority white district in one of the southern states covered by Section 5 was Andrew Young. He was elected in 1972 from the Fifth Congressional District located in the Atlanta metropolitan area and in which blacks were over 40% of the population. McDonald, *supra,* in *Quiet Revolution* at 85. Still, voting was strongly racially polarized and he got only 25% of the white vote. In 1990 Young ran for Governor of Georgia. In both the primary and runoff he again got about one-fourth of the white vote, but running statewide where blacks are 27% of the population he was defeated. *Id.*

Only one black has ever been elected to Congress in this century from a majority white district in a non-covered southern state. Harold Ford, an African-American, was elected from the majority white Ninth District in the Memphis, Tennessee area in 1974. As a result of redistricting, the district now has a 54% black voting age population.

Given the failure of majority white districts to elect minority candidates, it is apparent that abolition of majority-minority districts would likely result in the elimination of most, if not all, of the African-American members of Congress from the South. The results in the rest of the country could be almost as dramatic. Of the 22 black members elected outside the South, only three were elected from majority white congressional districts. Elaine R. Jones, "In Peril: Black Lawmakers," *The New York Times,* Sept. 11, 1994, E19.

A pattern of minority office holding similar to that in Congress exists for southern state legislatures. Approximately 90% of all southern black legislators in the 1980s were elected from majority black districts. Handley, *supra,* in *Quiet Revolution* at 337. In Georgia, for example, of the 40 black members serving in the general assembly on January 1, 1994, only one was elected from a majority white district. Of the 31 black members of the Georgia house, 26 were elected from districts that were 60% or more black. Of the nine black members of the Georgia senate, eight were elected from districts that were 60% or more black. Members of the Georgia General Assembly, Senate and House of Representatives, Second Session of 1993-1994 Term (1994); *Johnson v. Miller*, No. 194-008 (S.D. Ga.), Tr. Vol. IV at 237; Stipulations Nos. 61-63; J. Ex. 11; Abrams Exs. 23-24.[30]

While only one black was elected from a majority white legislative district in Georgia, whites won in 14 (25.9%) of the 54 majority black districts. Given this level of white success, though majority black districts undeniably provide blacks better electoral opportunities, they cannot be dismissed simply as "quotas" or political "ghettos" for minorities. *Busbee v. Smith, supra,* 549 F. Supp. at 507.

The number of black elected officials in Georgia grew from 3 in 1964 to approximately 500 in 1990, most of whom (88%) were elected to city and county offices. McDonald, *supra,* in *Quiet Revolution* at 89; Joint Center for Political and Economic Studies, *National Roster of Black Elected Officials* 10, 129 (1990). This increase can be "traced directly to the gradual demise of at-large elections and the implementation of single-member districts containing effective black voting majorities." McDonald, *supra,* in *Quiet Revolution* at 89-90. The conclusion is inescapable that a decline in the number of majority-minority districts would return Georgia, the South, and much of the rest of the nation to the days when legislative bodies were largely, or exclusively, white.

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[30] As might be expected, a similar pattern exists for counties in Georgia. In a recent study of the relationship between districting format and the election of African-Americans to county commissions in Georgia, Charles Bullock concluded that counties using at-large elections "lag far behind in the rate at which they elect black commissioners," and that "blacks elected in these counties [adopting district systems] won district rather than [at-large] seats." Charles S. Bullock, III, "Section 2 of the Voting Rights Act, Districting Formats, and the Election of African Americans," 56 J. Pol. 1098, 1103-04 (1994).

IV. Congress Has Sanctioned the Creation of Majority-Minority Districts

During the 1982 congressional hearings on the extension and amendment of the Voting Rights Act, opponents argued that the amendment of Section 2 would limit the political opportunities of minorities by allowing them "to become isolated" in single member districts, and would "prevent minority members from exercising influence on the political system beyond the bounds of their quota." *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess. 511 (statement of Dr. Edward J. Erler) and 1115 (statement of Robert M. Brinson) (1982) (hereinafter *Voting Rights Act Hearings*). Dissenting members of the Senate subcommittee similarly argued that adoption of a results standard for Section 2 would lead to the creation of majority-minority districts, or "political ghettos for minorities," and that while "[m]inority *representation* in the most primitive sense may be enhanced by the proposed amendment . . . minority *influence* would suffer enormously." S.Rep. No. 417, 97th Cong., 2d Sess. 103 (1982) (additional views of Sen. Orrin G. Hatch of Utah).

Congress weighed these arguments, but determined that minorities should be guaranteed the equal right to elect representatives of their choice, and that districting systems were an appropriate way of securing that right. According to the Senate report, the testimony and other evidence presented to the subcommittee belied the predictions and speculations that the amendment of Section 2 would limit the political opportunities of minorities. *Id.*

at 31-32. The subcommittee found there was "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify." *Id.* at 32.

The principal decision on which the committee relied was *White v. Regester, supra,* invalidating multimember legislative districts on the ground that they diluted minority voting strength and requiring the adoption of single member districts to bring the minority community "into [the] full stream of political life of the county and State." *Id.* at 769, 773. In 1982 Congress adopted the legal standard for proving vote dilution established in *White v. Regester* as the "results test" of amended Section 2. *Gingles, supra,* 478 U.S. at 35.

The Senate report, moreover, provides that in implementing remedies for Section 2 violations, a

> court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

S.Rep. No. 417, *supra,* at 31. One of the cases cited in the report as representing the "complete and full" remedy standard was *Kirksey v. Board of Supervisors,* 554 F.2d 139, 150-51 (5th Cir. 1977), in which the court rejected a proposed redistricting plan for a county board of supervisors because the two minority districts contained only "skin-of-the-teeth" black majorities, and therefore failed to provide blacks a "realistic opportunity" to elect representatives of their choice. The court also rejected the claim that an ameliorative plan "would be a racial gerrymander." *Id.* at 151.

In light of the legislative history and the language of the statute, the Court has consistently held that Section 2 guarantees the right "of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter, supra,* 113 S.Ct. at 1155. And where violations are established, Congress itself has determined that complete and full remedies, including majority-minority single member districts, may properly be implemented. *See Johnson v. De Grandy, supra,* 114 S.Ct. at 2661 ("society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity").

Congress also concluded that there was no factual basis for contending that majority-minority districts increased racial tensions or caused other harm. Critics of the 1982 amendment argued that a results standard for Section 2 would "deepen the tensions, fragmentation and outright resentment among racial groups," *Voting Rights Act Hearings, supra,* at 662 (statement of John H. Bunzel), would "pit race against race," *id.* at 745 (statement of Michael Levin), "would exacerbate, race consciousness," *id.* at 1250 (statement of Prof. Henry Abraham), "may well foster polarization," *id.* at 1328 (statement of Donald L. Horowitz), and would "compel the worst tendencies toward race-based allegiances and divisions." *Id.* at 1449 (letter from Prof. William Van Alstyne) (1982). Congress rejected these arguments on the ground that there was no evidence to support them, and concluded that the amendment would not "be a divisive factor in local communities by emphasizing the role of racial politics." S.Rep. No. 417, *supra,* at 31-2.

The decisions of district courts in the post-*Shaw v. Reno* redistricting cases do not contradict the findings of

Congress. In *Johnson v. Miller, supra,* for example, the three judge court concluded that "the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters." Slip op. at 32. In the present case, the district court acknowledged "the great benefits that are derived by an increase in minority representation in government," that "minorities have shown that they perform admirably," that they "provide positive role models for all black citizens," and that they "insure that the legal obstacles to minority advancement in all areas of life will be eliminated." App. at 21a. Far from polarizing the community or increasing tensions, non-dilutive redistricting plans are a necessary remedy for continuing racial bloc voting and confer a benefit on persons of all races.

◆

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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No. 94-558, -627

IN THE
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Supreme Court, U.S.
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UNITED STATES,
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STATE OF LOUISIANA, *et al.*,
Appellants,

v.

RAY HAYS, *et al.*,
Appellees.

On Appeals from the United States District Court for the Western District of Louisiana

BRIEF OF BERNADINE ST. CYR, HAZEL J. FREEMAN, DONALD THIBODEAX, PARTICK FONTENONT, JANICE FRAZIER, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE LOUISIANA LEGISLATIVE BLACK CAUCUS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

Bernadine St. Cyr, Hazel J. Freeman, Donald Thibodeax, Patrick Fontenot, and Janice Frazier are African-

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[1] Letters consenting to the submission of this brief have been filed with the Clerk of this Court.

American voters residing in the State of Louisiana. The Louisiana Legislative Black Caucus includes the African-American members of the Louisiana Legislature, all of whom are elected representatives and voters of the State of Louisiana, and many of whom reside in the present Fourth Congressional District. The Caucus supported the creation of the current Fourth Congressional District, a position joined by a majority of Louisiana's elected legislature, including both white and African-American legislators. These individual voters and the Caucus sought to intervene in the District Court to protect the interest of voters in a reapportionment plan that complied with the requirements of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution of the United States, but that intervention was denied. The NAACP Legal Defense and Educational Fund, Inc. ("the Fund") is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The Fund has participated in many of the significant constitutional and statutory voting rights cases in this Court. *See, e.g., United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. ___, 115 L. Ed. 2d 348 (1991); *Houston Lawyers Association v. Attorney General of Texas*, 501 U.S. ___, 115 L. Ed. 2d 379 (1991).

SUMMARY OF ARGUMENT

Contrary to the opinion of the court below, there is an extensive, indisputable legal and factual basis supporting the Louisiana Legislature's conclusion, following the 1990 census, that compliance with the Voting Rights Act of 1965 required it to fashion a Congressional redistricting plan with two African-American-majority districts. Far from being pretextual (as the court below suggested), this conclusion is compelled in light of (a) the state's long history of official discrimination against its African-American citizens (including restrictions upon their exercise of the franchise and neutralization of their voting strength); (b) the repeated invalidation, by federal courts or as a result of objections lodged by the Attorney General of the United States pursuant to Section 5 of the Act, of redistricting plans that had been adopted by the legislature because those plans were found to deny Black voters an equal opportunity to participate in the political process and to elect candidates of their choice to a variety of offices; and (c) the continued existence of white bloc voting against African-American candidates in Louisiana elections.

ARGUMENT

INTRODUCTION

Amici Curiae are African-American voters of the State of Louisiana, the Louisiana Legislative Black Caucus, and the NAACP Legal Defense and Educational Fund, Inc., which represents the individual *amici* here as well as voters in North Carolina, Texas, and Georgia[2] who have intervened in suits that seek to attack majority-African-American and -Hispanic-American Congressional districts in those states. In Louisiana, as in each of these states, the purposeful creation of majority-minority districts arises in a specific historical context which the court below should have, but did not, adequately take into account in its decision.

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[2] *See Shaw v. Hunt*, Nos. 94-923, -924; *Lawson v. Vera*, Nos. 94-805, -806, -988; and *Johnson v. Miller*, Nos. 94-631, -797, -929, respectively.

There are two primary aspects to this context. *First*, each of these states has a long and shameful history of denying minority citizens the right to vote through a wide variety of devices and means, both "sophisticated and simple-minded."[3] *Second*, in each of these states it is still true that large numbers of white voters consistently do not vote for African-American or other minority candidates. Such white bloc voting has made it virtually impossible for minority candidates, whatever their qualifications or merit, to win an election in a district in which minority voters are not a majority of the electorate.

The creation of majority-minority districts was necessary to correct these evils and to provide African Americans and other minority voters with a fair chance to elect officeholders of their choice to the legislative body intended by the Constitution to be representative of the people as a whole. The post-1990 census Congressional redistricting plans enacted by the Louisiana legislature and signed by Louisiana Governor Edwin Edwards in 1992 and 1994 are directly responsible for dismantling the barriers to full participation in the election of members of Congress that have confronted Louisiana's African-American population since the end of Reconstruction.[4]

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[3] *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

[4] United States Representative William J. Jefferson of New Orleans, who has represented Louisiana's Second Congressional District since 1991, was elected from a majority-Black Congressional district created following a federal district court's finding that the construction of the New Orleans area districts in the state's post-1980 census Congressional redistricting plan violated Black voters' rights to participate equally in the electoral process and to enjoy an equal opportunity to elect candidates of their choice to Congress. *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court). Before Jefferson's election in 1990, the last African-American member of Congress from Louisiana was Charles Edmund Nash, who was elected

The present case, and others that are now pending and that will surely follow if this Court permits the result below to stand, have as their purpose the undoing of our society's hard-won progress toward democratic electoral processes open to all citizens. If successful, the inevitable effect of these cases would be to turn the clock back to a day when the voices of minority citizens were unheard in legislative halls, and when the only avenue open to them was that of protest and demonstration. That would be the antithesis of the truly color-blind society to which this Court has repeatedly and consistently committed itself.

THE UNCONTROVERTIBLE HISTORY OF DISCRIMINATION AGAINST AFRICAN AMERICANS IN LOUISIANA, THE REPEATED DILUTION OF THEIR VOTING STRENGTH, AND THE PERSISTENCE OF WHITE BLOC VOTING, AMPLY JUSTIFIED THE CHALLENGED DISTRICTING PLAN

The district court properly held that "[a]dhering to federal anti-discrimination laws and remedying past or continuing discrimination could constitute compelling governmental interests [for the adoption of Louisiana's post-1990 census Congressional redistricting plans] if the State could 'demonstrate a strong basis in evidence for its conclusion that remedial action was necessary.'" *Hays v. Louisiana*, US J.S. App. at 7a (*quoting City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989)). The district court erred, however, in finding that the adoption of Act

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in 1874 and served one term. Bruce A. Ragsdale and Joel D. Treese, BLACK AMERICANS IN CONGRESS, 1870-1989 101-02 (1990). Congressman Cleo Fields of Baton Rouge, United States Representative for Louisiana's Fourth Congressional District, which was invalidated by the court below, was initially elected in 1992.

1 was unjustified under these standards. Instead, in complete disregard of the record before it and in contravention of this Court's decisions,[5] the district court characterized the adoption of Act 1 as "[u]sing the disease as a cure" and struck down Louisiana's remedial efforts. *Id.* at 124-25.

There was ample justification for the Louisiana Legislature's decision to enact a Congressional apportionment plan with two majority-African-American districts, in light of the historical and current factual context in which it acted: pervasive discrimination against African Americans in Louisiana,[6] the state's repeated practice of drawing electoral districts that diluted African-American voting strength, and the continued existence of bloc voting by whites against African-American candidates.

A. *The History of Egregious Discrimination against African Americans in Louisiana*

For centuries, the African-American population of Louisiana was subjected to the most blatant, pervasive, and debilitating forms of discrimination, including a complete denial of voting rights, solely on the basis of race.[7]

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[5] *See, e.g., Johnson v. DeGrandy*, ___ U.S. ___, ___, 129 L. Ed. 2d 775, 796 (1994) ("[T]he lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity").

[6] *Cf. Major v. Treen*, 574 F. Supp. at 351 ("Evidence of 'past discrimination' . . . is relevant insofar as it impacts adversely on a minority group's present opportunities to participate in government"); *Zimmer v. McKeithen*, 485 F.2d 1297, 1306 (5th Cir. 1973) (*en banc*) ("The district court concluded that . . . removal [of impediments to registration and the elimination of *de jure* school segregation] vitiated the significance of the showing of past discrimination. This conclusion is untenable, however, precisely because the debilitating effects of these impediments do persist"), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976).

1. *Discrimination in voting*

Neither enslaved nor free persons of color were allowed to vote in Louisiana until after the Civil War.[8] Following the Civil War, African Americans in Louisiana were afforded their first opportunity to participate in the electoral process. By 1898, "approximately 44% of all the registered voters in the State were Negroes," *Louisiana v. United States*, 380 U.S. 145, 147 (1965). Inclusion of African Americans in the political process in Louisiana was only temporary, however, and by the turn of the century, they were almost completely excluded from political participation in the state.[9]

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[7] Even before Louisiana became a state in 1812, racially-based exclusion from the political process was in place. "[T]he *Codes Noir*, from the 1724 Code to Act 83 of the Territorial Legislature of 1806, disfranchised Negroes." *United States v. Louisiana*, 225 F. Supp. 353, 363 (E.D. La. 1963) (three-judge court), *aff'd*, 380 U.S. 145 (1965). "The Louisiana Constitution of 1868 [adopted during Reconstruction] for the first time permitted Negroes to vote. La. Const. 1868, Art. 98." *Louisiana v. United States*, 380 U.S. 145, 148 n.5 (1965).

[8] *See* Article II, Section 8 of Louisiana Constitution of 1812, restricting right to vote to "free white male" members of the population. "[D]uring the era of slavery . . . the franchise was conferred exclusively upon white males." *Major v. Treen*, 574 F. Supp. at 340; *see United States v. Louisiana*, 225 F. Supp. at 363.

[9] Between 1896 and 1907 the number of Black registered voters in Louisiana plummeted from approximately 135,000 to fewer than 1,000 statewide. *Major v. Treen*, 574 F. Supp. at 340. In an address to the Legislature following the 1898 Louisiana Constitutional Convention, Governor Murphy J. Foster stated:

> The white supremacy for which we have so long struggled . . . is now crystallized into the Constitution as a fundamental

Without exception, Louisiana employed every electoral device ultimately condemned by this Court as violative of African Americans' right to equal political participation. These included the "grandfather" clause,[10] the white primary,[11] and the "interpretation" test.[12]

> part and parcel of that organic instrument . . . With this great principle thus firmly imbedded in the Constitution, and honestly enforced, there need be no longer any fear as to the honesty and purity of our future elections.

United States v. Louisiana, 225 F. Supp. at 374.

[10] According to a contemporaneous publication, Louisiana's "grandfather" clause was adopted "'to allow many honorable and intelligent but illiterate white men to retain the right of suffrage, and the purpose of the educational or property qualification[s] was to disfranchise the ignorant negroes who had been a menace to the civilization of the State.'" *United States v. Louisiana*, 225 F. Supp. at 373 (*quoting* 4 Alcee Fortier, HISTORY OF LOUISIANA 235 (1904)).

[11] Soon after this Court invalidated Oklahoma's (and, necessarily, Louisiana's) "grandfather" clause in *Guinn v. United States*, 238 U.S. 347 (1915), Louisiana responded to the decision by, *inter alia*, authorizing political parties to conduct racially exclusive primary elections. Louisiana's white primary, "which functioned to deny blacks access to the determinative elections . . . persisted until its condemnation in *Smith v. Allwright*, 321 U.S. 649 (1944)." *Major v. Treen*, 574 F. Supp. at 340.

[12] *See generally United States v. Louisiana*, *supra* note 7. Circuit Judge John Minor Wisdom, writing for the majority of the three-judge court that originally invalidated Louisiana's "interpretation" test, wrote:

> A wall stands in Louisiana between registered voters and unregistered, eligible Negro voters. The wall is the State constitutional requirement that an applicant for registration 'understand and give a reasonable interpretation of any section' of the Constitutions of Louisiana or of the United States. It is not the only wall of its kind, but since the Supreme Court's demolishment of the white primary, the interpretation test has been the highest, best-guarded, most

A series of other "disenfranchisement techniques implemented by the state," including poll taxes, registration purges, literacy tests, citizenship tests, and laws prohibiting "single shot" voting, "suppressed black political involvement [in Louisiana] until banned by Congress in 1965," *Major v. Treen*, 574 F. Supp. at 340, or invalidated by federal courts, *see, e.g.*, *Anderson v. Martin*, 375 U.S. 399 (1964) (invalidating La. Act 538 of 1960, which required the race of candidates to be included on ballots).

In *Louisiana v. United States*, 380 U.S. 145 (1965), this Court unanimously affirmed the decision of a Louisiana federal court invalidating many of the racially discriminatory barriers to voter registration that had been erected by the state. There, the Court noted that an increase in Black voter registration (following the demise of the white primary after the *Smith v. Allwright* decision), coupled with the advent of school desegregation (following this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)), prompted the Louisiana Legislature to create "a committee which became known as the 'Segregation Committee.'" 380 U.S. at 149. The Louisiana Legislature's Segregation Committee was responsible for developing and implementing efforts "to preserve white supremacy." *Id.* Among the more effective means of achieving the goal of "preserv[ation of] white supremacy" in the political process was the "interpretation" test, *United States v. Louisiana*, 225 F. Supp. at 380-81.[13]

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effective barrier to Negro voting in Louisiana." *United States v. Louisiana*, 225 F. Supp. at 355.

[13] The "interpretation" test "required that an applicant for registration be able to 'give a reasonable interpretation' of any clause

In the two decades following this Court's invalidation of the white primary, the renewed administration of the "interpretation" test transformed Louisiana's voter registration offices into "'the front line of the battle' to retain a segregated society." *United States v. Louisiana*, 225 F. Supp. at 387. Registrars in 21 of Louisiana's 64 parishes discriminated against African-Americans who attempted to register to vote "not as isolated or accidental or unpredictable acts of unfairness by particular individuals, but *as a matter of state policy* in a pattern based on the regular, consistent, predictable unequal application of the [interpretation] test." *Id.* at 381 (emphasis supplied).[14]

After this Court's affirmance of the decision invalidating Louisiana's racially discriminatory "interpretation" test and other voter registration practices in *Louisiana v. United States,*[15] and Congress' adoption

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in the Louisiana Constitution or the Constitution of the United States." *Louisiana v. United States*, 380 U.S. at 148.

[14] Red River, DeSoto and Rapides Parishes, which are wholly or partially within District 4 of Act 1, were among the parishes where the interpretation test was used to thwart Black voter registration efforts; indeed, Red River Parish was specially identified by the three-judge court as one of the areas where "[t]he evidence of discriminatory application of the interpretation test [wa]s especially well documented and supported by testimony," *United States v. Louisiana*, 225 F. Supp. at 381 and n.77; *see also*, *id.* at 385 (table listing Black and white voting age population and registration in those parishes in 1956 and 1960).

[15] Louisiana's "citizenship test," which required applicants for registration to pass an "'objective test of citizenship'" and demonstrate that they were "'of good character and . . . [aware of] the duties and obligations of citizenship," was also challenged in *United States v. Louisiana*. The court entered a more limited injunction against use of the citizenship test than the complete statewide prohibition it imposed against further use of the interpretation test. *See* 225 F. Supp. at 392-98.

of the Voting Rights Act of 1965, increasingly subtle, but nevertheless effective, mechanisms for diluting African-American voting strength and counteracting African Americans' increasing access to the ballot surfaced throughout the state. The use of at-large or multimember district elections,[16] the majority-vote requirement,[17] and other election procedures and devices[18] combined with pervasive racially polarized voting throughout Louisiana to minimize the voting strength of the recently registered African-American population in the state.

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[16] *See, e.g., Zimmer v. McKeithen*, *supra* note 6 (invalidating multimember election districts in East Carroll Parish); *Parnell v. Rapides Parish School Bd.*, 425 F. Supp. 399 (W.D. La. 1976), *aff'd in relevant part*, 563 F.2d 180 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) (same for Rapides Parish). *See generally*, Richard L. Engstrom, Stanley A. Halpin, Jr., Jean A. Hill, and Victoria M. Caridas-Butterworth, *Louisiana*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 109-17 (Chandler Davidson and Bernard Grofman, eds., 1994)("Engstrom, *et al.*"); U. S. Exh. 9, *Hays v. Louisiana*, at 10-13 (listing court decisions and numerous Justice Department Section 5 objections to changes from single-member to multimember election districts in Louisiana, as well as to racially discriminatory single-member redistricting plans adopted by Louisiana jurisdictions in the 1970's).

[17] *See Zimmer*, 485 F.2d at 1306 (noting that the majority-vote requirement "has been severely criticized as tending to submerge a political or racial minority," and holding that it in fact had that result in East Carroll Parish).

[18] *See, e.g., Clark v. Edwards*, 725 F. Supp. 285, 301 (M.D. La. 1988) (noting that "[t]he requirement that each judicial candidate qualify to a specific post or division . . . limit[s] the ability of black voters to select candidates of their choice. . . . [T]he run-by division requirement in judicial elections is a functional equivalent [to an anti-single shot voting provision]"), *vacated on other grounds sub nom. Clark v. Roemer*, 750 F. Supp. 200 (M.D. La. 1990), *modified* , 777 F. Supp. 445 (M.D. La. 1990), *vacated*, 501 U.S. 1246 (1991), *on remand*, 777 F. Supp. 471 (M.D. La. 1991), *appeal dismissed*, 958 F.2d 614 (5th Cir. 1992).

Louisiana's "long history of de jure and de facto restrictions on the right of black citizens to register, to vote, and otherwise participate in the democratic process" is so notorious that within the past decade, Louisiana federal courts have "taken judicial notice of that history," *Clark v. Edwards*, *supra* note 18; *see also Chisom v. Edwards*, 690 F. Supp. 1524, 1534 (E.D. La. 1988) (same), *vacated on other grounds*, 853 F.2d 1186 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988); *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1116 (E.D. La. 1986) ("The historical record of discrimination in the State of Louisiana and the Parish of Jefferson is undeniably clear, and the record suggests it has not ended even now"), *aff'd*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989).

2. *Discrimination in education and other areas*

One federal district court observed in a 1983 case that the discrimination African-American residents of Louisiana encountered outside the political arena was as pervasive and severe as that encountered within the political realm:

> Like other southern states, Louisiana enforced a policy of racial segregation in public education, transportation and accommodations. Despite the Supreme Court's ruling in *Brown v. Board of Education* . . . local school boards refused to desegregate in the absence of a federal court order. . . . A dual university was operated by the state until 1981, when it was dismantled pursuant to a consent decree. . . . [and p]ublic facilities were not open to members of both races until the late 1960s.

Major v. Treen, 574 F. Supp. at 341 (citation omitted); *see also Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968) (detailing widespread resistance to school desegregation throughout Louisiana for more than a decade following the *Brown* decision, largely facilitated by a series of legislative enactments designed to evade the effect of that ruling).[19]

Testimony before the court below underscores the *Major v. Treen* panel's assessment of the pervasiveness of state-enforced segregation in Louisiana. One of the more telling examples of this was the testimony of a white state Senator about the leadership role that African-American members of the legislature played in the effort to repeal state laws that required human blood to be identified according to the race of the donor, and kept segregated. Armand J. Brinkhaus (a member of the legislature since 1968) testified that Ernest "Dutch" Morial, who was then the lone African-American member of the entire Louisiana legislature, "fought a battle on a bill . . . to mandate a discontinuance of [racial] labeling [of] blood." June 22, 1994 Tr., Vol. 4, at 24, 25. According to Senator Brinkhaus, the bill introduced by then-Representative

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[19] As the *Poindexter* court summarized:

> [F]or a hundred years, the Louisiana legislature has not deviated from its objective of maintaining segregated schools for white children. . . . Open legislative defiance of desegregation orders shifted to subtle forms of circumvention . . . [b]ut *the changes in means reflect no change in legislative ends*.

275 F. Supp. at 845 (emphasis supplied). *See also Hall v. St. Helena Parish School Bd.*, 417 F.2d 801 (5th Cir.) (holding that 37 Louisiana school boards, including those for the present Fourth Congressional District parishes of Ascension, Desoto, Natchitoches, Pointe Coupee, Rapides, St. Landry, St. Martin and West Baton Rouge were required to eliminate continued school segregation through some means other than ineffective "freedom of choice" policies), *cert. denied*, 396 U.S. 904 (1969).

Morial was not enacted in 1968 and did not pass until "the numbers [of African-American legislators] increased," *id.* at 25.[20]

In the 1993 evidentiary hearing before the court below on the constitutionality of Louisiana Act 42 (the first post-1990 census Congressional redistricting plan invalidated by the court below), Tulane University history professor Lawrence Powell testified that "Louisiana was the only state in which Black illiteracy remained above 70 percent throughout the 19th Century . . . [and] from the late 1880s until the mid-1920s Louisiana was second only to Mississippi in lynching." Aug. 19, 1993 Tr. at 55.

3. *Continuing impact of this discrimination*

While the enactment and enforcement of civil rights laws has afforded African Americans some relief from racial discrimination in Louisiana and elsewhere, as the district court found in the 1983 *Major v. Treen* decision, Louisiana's long-lived discriminatory practices have had, unfortunately, similarly long-lived effects:

> [T]he residual effects of past discrimination still impede blacks from registering, voting or seeking elective office. . . . Blacks in contemporary Louisiana have less education, subsist under poorer living conditions and in general occupy a lower socio-economic status than whites. Though

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[20] *Cf.* Lawrence N. Powell, *Read My Liposuction: The Makeover of David Duke*, 203 NEW REPUBLIC 18 (Oct. 15, 1990) (in a 1990 debate with United States senatorial campaign opponent Ben Bagert, David Duke "admitted that he still believes that the blood supply should be racially segregated"). After the court below invalidated Act 1 and imposed its own districting plan, David Duke announced his intention to run for the United States Congress from Louisiana. See Alice Love, *David Duke Wants to Run for New Cajun House Seat*, 39 ROLL CALL, August 4, 1994, at 1.

> frequently more subtle, employment discrimination endures. These factors are the legacy of historical discrimination in the areas of education, employment and housing. . . . A sense of futility engendered by the pervasiveness of prior discrimination, both public and private, is perceived as discouraging blacks from entering into the governmental process.

574 F. Supp. at 341. More recently, Chief Judge John V. Parker of the Middle District of Louisiana reached a similar conclusion and rejected the state defendants' argument that official acts of discrimination which occurred before the enactment of the Voting Rights Act in 1965 are irrelevant to determining whether a challenged electoral practice discriminates against African-American voters. Chief Judge Parker held that "[t]he *entire* history of discrimination must be considered although . . . there have been improvements made by virtue of the Voting Rights Act of 1965." *Clark v. Edwards*, 725 F. Supp. at 296 (emphasis supplied). Judge Parker found that Louisiana's "'history of racial discrimination, both de jure and de facto, continues to have an adverse effect of the abilities of its black residents to participate fully in the electoral process.'" *Id.* (quoting *Major v. Treen*).

The court below concluded that the Louisiana Legislature lacked any basis for believing that if it failed to adopt a Congressional districting plan containing two districts that would afford African Americans an equal opportunity to elect candidates of their choice, the Attorney General would interpose a Section 5 objection or African-American voters would bring a successful Section 2 suit challenging the plan. The court's conclusion is simply untenable in light of the extensive history and continuing adverse impact of decades of state-sponsored discrimination against the African-American citizens of the State of Louisiana.

B. *The State's Consistent Dilution of African-American Voting Strength in the Drawing of Districts*

In every post-census redistricting undertaken by the Louisiana Legislature since the adoption of the Voting Rights Act, either the federal courts (acting to enforce the provisions of the United States Constitution or of the Voting Rights Act), or the Justice Department (acting pursuant to Section 5 of the Voting Rights Act), have rejected at least one statewide redistricting plan adopted by the legislature on the ground that the proposed plan diluted African-American voting strength.

In 1971, for example, a Louisiana federal court "whole-heartedly concurred with the findings of the Attorney General [under Section 5]" that the statewide legislative redistricting plan adopted by the Louisiana Legislature was racially discriminatory and held that it would have invalidated the plan for similar reasons, even if the Attorney General had not objected to its implementation. *Bussie v. Governor of Louisiana*, 333 F. Supp. 452, 454 (E.D. La. 1971), *aff'd and modified*, 457 F.2d 796 (5th Cir. 1971) (*per curiam*), *vacated sub nom. Taylor v. McKeithen*, 407 U.S. 191 (1972), *on remand*, 499 F.2d 893 (5th Cir. 1974). The *Bussie* court noted that "[d]uring the Twentieth Century only two [N]egroes . . . sat in the Louisiana Legislature, and even they did not sit at the same time. One succeeded the other." 333 F. Supp. at 457; see also *Hays* 1994 Tr., Vol. 4, at 24-25 (Brinkhaus testimony discussing presence of only one African-American in state legislature in 1968). After a decade of elections under the redistricting plan adopted by the legislature after the *Bussie* decision, 10 Louisiana

House districts and 2 Louisiana Senate districts had elected African-American candidates. Engstrom, *et al.*, at 111; *see also* U.S. Exh. 9 at 12-13 ¶ 19.

The state legislative redistricting plan adopted after the 1980 census reduced the number of Black-majority House districts from 17 to 14. The plan could not be implemented because of the Section 5 objection interposed by the Attorney General to the implementation of this retrogressive plan. *Id.* at 14-15, ¶ 23.

The New Orleans area districts in the Congressional redistricting plan adopted by the Louisiana legislature following the 1980 census were successfully challenged by African-American voters in *Major v. Treen*[21] and was replaced ultimately by a plan containing one majority-Black Congressional district. As set forth fully in the district court opinion in that case, the plan afforded African Americans less opportunity than whites to participate in the electoral process and to elect candidates of their choice, in violation of Section 2 of the Voting Rights Act of 1965, as amended. In reaching its conclusion that the construction of the First and Second Districts in the plan violated Section 2, the court considered "as . . . one aspect of the totality of circumstances, the evidence that opposition to the creation of a majority black district was responsible, to a significant extent," for the adoption of the plan. 574 F. Supp. at 355 n.39.[22]

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[21] Bernadine St. Cyr (*amicus* herein) was one of the plaintiffs in the *Major v. Treen* case.

[22] The district court found that Governor Treen opposed the adoption of the plan originally supported by the legislature at least partially for racial reasons: "He denounced any legislative scheme which intentionally drew boundary lines so as to consolidate a

The *Major* court also noted the extremely irregular procedure used to adopt the plan:

> Both houses of the Louisiana Legislature . . . approved reapportionment bills [that provided for the creation of a majority-Black district in New Orleans and its environs]. . . . Upon learning of the action of the legislature, Governor Treen announced his intention to veto the . . . [plan] if finally passed. . . . A sufficient number of legislators changed their position in response to the threatened veto to assure the demise of the . . . [plan].

574 F. Supp. at 333. The Legislature then delayed appointment of a conference committee to consider alternatives to the abandoned reapportionment bill and instead, an all-white group of legislators and other "'interested' parties" met privately "in the sub-basement of the State Capitol" to develop a new redistricting plan. *Id.* at 334. The predictable outcome of the legislators' secret meeting was the abandonment of the concept of developing a redistricting plan containing a majority-Black district, and the substitution of the plan ultimately

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majority of one race within a single district. He . . . characterized [the creation of a majority-Black New Orleans-based district] as an attempt by the Louisiana Legislature to enact into law the discredited idea of proportional representation. . . . [However, the Governor's] concerns were restricted to the aggregation of *blacks* within one district; the coalescence of whites was not regarded as ominous so long as [the white incumbent congressman's] chances for re-election were maximized. . . . [Consequently, an Orleans Parish-based] district with 55% *white* population encountered no objection [from the Governor]." 574 F.Supp. at 333 (emphasis supplied). *Cf.* US J.S. App. at 10a-11a (objecting to creation of 55%-Black District 4 of Act 1, while adopting court-ordered plan with far more heavily concentrated white populations in every district except the *Major v. Treen* remedial district).

adopted by the Louisiana legislature ("Act 20"), which did not contain a single majority-Black district. *Id.* at 334-35. After Governor Treen expressed his approval of Act 20, an all-white conference committee, consisting of 3 state Senators (Hudson, Nunez and O'Keefe) and 3 state Representatives (Alario, Bruneau and Scott) voted 4 to 2 in favor of referring Act 20 to the full legislature for approval. *Id.* at 336-37.[23] Assessing the procedure which yielded the adoption of Act 20, the district court wrote:

> [R]ather than utilizing the routine mechanism of the conference committee following the House's withdrawal of its approval of the . . . [original redistricting] plan, the legislative leaders convened a private meeting. . . . Because all were aware that the conflicting objectives of the Governor and black legislators with respect to a black majority district could not be harmonized, the latter *were deliberately excluded from the final decision-making process*.

574 F. Supp. at 352 (emphasis supplied).[24]

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[23] The district court found that Governor Treen's opposition to the first legislatively supported plan was "predicated in significant part on [the plan's] delineation of a majority black district centered in Orleans Parish." 574 F. Supp. at 334. See also *infra* p. 20, text at n.25.

[24] While Governor Treen explained his opposition to the creation of a majority-Black congressional district as the product, *inter alia*, of his "concern . . . [about] racial polarization," 574 F. Supp. at 333, and his belief that African-American voting strength is actually enhanced in so-called influence districts, rather than in majority-Black districts, his early political record evinced minimal "concern" about fostering racial polarization in the electorate or enhancing African-American voting strength. The 1978 ALMANAC OF AMERICAN POLITICS stated that in 1964 and 1968 campaigns against New Orleans Congressman

It is striking that contemporary opposition to Act 1 (and its second majority-African-American Congressional district) sounded the same themes as in 1980. For example, state Representative Charles Bruneau, who criticized the creation of Louisiana's first majority-Black Congressional district in the 1980's on the ground that New Orleans "already ha[d] a nigger mayor, and [it] d[id]n't need another nigger bigshot,"[25] also opposed the adoption of Act 1. Apr. 18, 1994 Louisiana House of Representatives and Governmental Affairs Committee Hearing Minutes at 37. In response to Speaker Pro Tem Copelin's argument that District 4 of Act 1 essentially replicated the former Eighth Congressional District, once represented by (white) Congressman Gillis Long, Representative Bruneau replied, "Of course, Mr. Copelin, as we say, that was then and this is now." *Id.* at 46. *Cf.* US J.S. App. at 4a ("[V]arious witnesses asserted that District Four was inspired by 'the old Eighth' district thereby satisfying the concept of 'traditional' districting principles. . . . The 'old Eighth' . . . was crafted for the purpose of ensuring the reelection of Congressman Gillis Long . . . [whereas n]ew District Four was drafted with the specific intent of ensuring a second majority-minority Congressional district").

Hale Boggs, "Treen's big issue was Civil Rights: in 1964 he charged that Boggs secretly favored the Civil Rights Act of that year; in 1968 he used Boggs' support of the Civil Rights Acts of 1965 and 1966 [as campaign issues]."

[25] *See Nomination of William Bradford Reynolds to be Associate Attorney General of the United States; Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 440 (1985) (*reprinting* analysis of Section 5 submission prepared by Robert N. Kwan, Attorney, Voting Section, Civil Rights Division, United States Department of Justice).

The United States Attorney General objected under Section 5 of the Voting Rights Act to the implementation of both the Louisiana House and Louisiana Senate redistricting plans adopted by the Legislature after the 1990 census. U.S. Exh. 9, at 19, ¶ 29. Also in 1991, shortly before undertaking Congressional redistricting, the legislature reapportioned the statewide Board of Elementary and Secondary Education ("BESE") based on the 1990 census. There are eight elected members of the BESE. The legislature initially devised a plan which had only one majority-African-American BESE district, which prompted an objection under Section 5 by the Attorney General. *Id.*[26]

In sum, after this Court affirmed orders striking down direct and indirect restrictions upon African-American suffrage in Louisiana, as described in the preceding section, the Legislature repeatedly acted to fashion state and national legislative districts that would eliminate or minimize African-American voting strength. In a consistent pattern that continued virtually up to the very moment that the Legislature redrew the state's Congressional districts after the 1990 census, those dilutive plans were struck down by the federal courts or were denied preclearance under Section 5 of the Voting Rights Act by the Attorney General of the United States. The Legislature thus had more than enough evidence to support its conclusion that drawing yet another plan which diluted minority voting strength would be rejected by the Justice Department and/or challenged successfully in court.

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[26] Ultimately, an eight-member redistricting plan for the BESE which included two Black-majority districts was adopted by the Louisiana Legislature and precleared under Section 5.

The Legislature also knew that in each instance, the remedy for its dilutive districting had involved the creation of majority-Black electoral districts to afford African-Americans the opportunity to elect candidates of their choice, and that implementation of the remedies had mitigated the persistent underrepresentation of African Americans in Louisiana's state legislative delegations and on the BESE.

On these facts there is simply no support whatsoever for the "finding" by the court below that "the State did not have a basis in law or fact to believe that the Voting Rights Act *required* the creation of two majority-minority districts," US J.S. App. at 9a. Moreover, the evidence demonstrates that the Legislature was well aware that a "Red River" Congressional district markedly similar to the ultimate Fourth District in Act 1 had been maintained through the 1970's and 1980's. Refusal to follow the same districting principles after the 1990 census so as to create a second majority-Black district would almost certainly have resulted in either a Section 5 objection or a court challenge by the state's African-American voters. For these reasons, the holding by the court below that reference to the "old eighth" district was either a "pretext" for the Legislature's "specific [and unlawful] intent of ensuring a second majority-minority Congressional district," US J.S. App. at 5a, or was irrelevant because "the old eighth district was never challenged on constitutionality," *id.* at 18a (Shaw, J., concurring), is baseless.

C. *The Persistence of Racially Polarized Voting*

There is extensive evidence in the record of the persistent phenomenon of racially polarized voting in Louisiana elections, and of the degree to which white bloc voting, combined with other features of Louisiana's election system, continues to impede African-American political participation and limit the opportunity for African Americans to elect candidates of their choice in the state.

Within the past decade, there have been repeated judicial findings that racially polarized voting continues to occur with regularity in Louisiana. For example, in a recent Section 2 case challenging some of Louisiana's judicial election districts, the district court observed that "[t]he expert witnesses of *both* sides . . . agreed that there is widespread racial polarization in voting in Louisiana," *Clark v. Edwards*, 725 F. Supp. at 296 (emphasis supplied). The *Clark* court also noted that "the fact that in 54 [elections analyzed] . . . white voters never voted even a plurality for the black candidate strongly indicates racial polarization of white voters." *Id.* at 297.[27] As a result of the compelling evidence of racially polarized voting, as well as other evidence presented by plaintiffs, the district court

> conclude[d] that across Louisiana . . . there is consistent racial polarization in voting . . . . [and the court is] convinced . . . that the white majority has . . . repeatedly [voted sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate] in Louisiana judicial elections.

Id. at 298-99.[28]

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[27] *See also id.* at 304 (finding a "state-wide pattern of racially polarized voting which . . . is 'pronounced and persistent'") (quoting plaintiffs' expert Dr. Richard Engstrom).

[28] The court also held that "both subtle and overt racial appeals . . . still do appear in some white-black campaigns." 725 F. Supp. at 299.

The State of Louisiana and the United States proffered similar evidence to the court below in defense of Louisiana Act 1. In his 1993 testimony before the lower court, Dr. Richard Engstrom stated: "[A]cross Louisiana, voting is racially polarized. . . . [I]t does not begin at one parish line and end at another parish line. It's a pervasive phenomenon within the State." Aug. 19, 1993 Tr. 73. Dr. Engstrom also testified concerning the many "inexorable zero[es]"[29] among the elected branches of government in Louisiana: "[T]here are no Black statewide elected officials in Louisiana . . . [e]lected from a statewide majority white electorate. . . . There have been no Blacks elected to Congress from Louisiana in this century in a district with a majority white voter registration . . . [and t]here have been no African Americans elected to the state legislature in Louisiana . . . this century from a district . . . in which a majority of the registered voters were white." *Id.* at 79-80.

The decision below does not address any of this evidence and instead fast-forwards to a color-blind society which unfortunately is far from the present-day reality of Louisiana.[30]

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[29] *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

[30] For example, the court below wrote: "[W]e refuse to accept the explanation [for the configuration of District 4 in Act 1] that citizen response to issues such as education, crime and health care is driven by skin pigmentation." US J.S. App. at 10a. The difficulty with this analysis is that it permits no consideration in the redistricting process of common political interests which many African Americans share -- including because they have had the common experience of suffering from official Louisiana policies of racial discrimination -- even while recognizing that members of numerous other racial, ethnic, and religious groups may share common interests. Incredibly, the court suggests, as one basis for its conclusion that Act 1 is constitutionally deficient, that it breaks down barriers between such

D. *The "Totality of the Circumstances"*

This Court recently emphasized the importance, in deciding claims under Section 2 of the Voting Rights Act, of comprehensively assessing all of the facts. "In modifying § 2 [in 1982], Congress . . . endorsed our view in *White v. Regester* that 'whether the political processes are "equally open" [to minority voters] depends upon a searching practical evaluation of the "past and present reality,"'" *Johnson v. DeGrandy*, *supra* note 5, 129 L. Ed. 2d at 795 (citations omitted). Unlike the thorough analysis of the proof required by this Court's previous decisions and reflected in the *Clark* decisions, the ruling below cavalierly dismisses the evidence and misapplies the decisions of this Court in an effort to avoid careful consideration of what the record shows. The court below wrote:

> Defendants elicited testimony that the sordid history of unconstitutional treatment of black citizens in Louisiana prompted the State to tinker with district lines in order to ensure minority control at the polls. . . . What the defense failed to establish is where the Civil Rights Act of 1964 and the Voting Rights Act of 1965 have failed to accomplish what the State now sets out to do. Without concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies, we cannot agree that . . . racially

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groups. *See* US J.S. App. at 17a ("District 4 includes North Louisiana English-Scotch-Irish, mainline Protestants, South Louisiana French-Spanish-German Roman Catholics, traditional rural black Protestants and Creoles. The district encompasses North, Central and South Louisiana, each of which has its own unique identity, interests, culture, and history") (Shaw, J., concurring).

> configured voting districts [are] warranted. *Croson* and *Bakke* dictate this result.

US J.S. App. at 10a. The court below does not explain how the continued debilitating effects of prior discrimination that were identified by the *Clark* court just four years ago,[31] long after passage of the 1964 and 1965 federal laws to which it refers, have been eliminated in a state whose redistricting efforts immediately prior to the measure attacked in this litigation prompted objections from the Attorney General. Nor does it identify any evidence presented by the appellees indicating that racial disparities attributable to prior discrimination have vanished from Louisiana. (There was none.) Contrary to the suggestion in the opinion below, the decisions of this Court do not "dictate" the result reached in this case. Unlike in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the federal courts have made repeated findings of racial discrimination, and of its continuing effects, that fully support the Louisiana legislature's action.

Writing just two years before the last decennial census, Chief Judge Parker observed: "If all of us voted without regard to race, the problem would be solved and there would be no claim of a . . . [Voting Rights Act] violation. That day does not yet seem to have arrived [in Louisiana]." *Clark*, 725 F. Supp. at 300. The Louisiana legislature embarked on the task of developing a Congressional redistricting plan for the state only a few years later. It defies common sense and conflicts with the extensive evidence presented by the State and the United States below to conclude, as the district court did, that race has so quickly become an inconsequential factor or irrelevant matter to Louisiana's body politic.

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[31] "[H]istorical de jure and de facto restrictions on minority voting . . . [and] socio-economic factors" which reflected historic discrimination and the disparate economic and educational status of Black and white residents of Louisiana "have not been shown to have dissipated . . . [and] "still operate to discourage more blacks than whites from full [political] participation." *Clark v. Roemer*, 777 F. Supp. 471, 478 (M.D. La. 1991), *appeal dismissed*, 958 F.2d 614 (5th Cir. 1992).

Moreover, in light of the repeated violations of the voting rights of the State's minority citizens, it is patently unfair to assign responsibility for the race-consciousness of the post-1990 census Congressional redistricting to the state's very recent efforts to comply with the demands of the Voting Rights Act by enacting a Congressional redistricting plan that would fairly recognize African-American voting strength in the state and would not operate to minimize or cancel out the votes of nearly one-third of the population of the state. Finally, as we have earlier noted, the conclusion of the court below (that the Louisiana Legislature lacked any basis for believing that if it failed to adopt a Congressional districting plan containing two districts that would afford African Americans an equal opportunity to elect candidates of their choice, the Attorney General would interpose a Section 5 objection or African-American voters would bring a successful Section 2 suit challenging the plan) is simply untenable in light of the extensive history and continuing adverse impact of decades of state-sponsored discrimination against the African-American citizens of the State of Louisiana.

The decision below is particularly troubling because, as Dr. Richard Engstrom said to the lower court, the Louisiana Legislature's efforts to adopt a Congressional redistricting plan that complied fully with the Voting Rights Act of 1965 and to take a prophylactic approach to congressional redistricting, attempting to accommodate the concerns of the state's African-American as well as its white citizens, "was a real aberration. . . . We have a history of not complying with the Voting Rights Act until forced to either by the Justice Department or by federal courts such as in Major versus Treen." Aug. 19, 1993 Tr. 100. The state of Louisiana should not be stymied in this earnest and long overdue overture towards remedying "the sordid history of unconstitutional treatment of black citizens in Louisiana," US J.S. App. at 9a.

CONCLUSION

The history of Louisiana is duplicated in most of the states that have had a background of discrimination in voting. In redistricting after the 1990 census, public officials in many instances made good faith efforts to comply with the interpretations of the statutory and constitutional requirements for reapportionment announced by this Court and the lower federal courts. In jurisdictions with a history of discrimination in voting and other areas, where minority voters were politically cohesive, and where there were established patterns of racially polarized voting that made it almost impossible for a submerged minority to be represented, officials shouldered their legal obligation to create districts that gave minority voters equal access to the political process and a fair opportunity to elect representatives of their choice.

The results of this effort were of great benefit not only to minority communities, but to the body politic as a whole. For the first time since the end of Reconstruction the delegations to the United States House of Representatives (from the affected states) were indeed representative. Legislative bodies at the local and state levels similarly encompassed the interests of all of the electorate.

In short, governmental officials and their constituents relied on the holdings of this Court when they made the difficult decisions inherent in the redistricting process. They sought to follow the law as expressed in those decisions and the innumerable decisions of the lower courts enforcing them.[32] Unfortunately, in a number of instances litigants and lower federal courts have misread this Court's decision in *Shaw v. Reno*, 509 U.S. ___, 125 L. Ed. 2d 511 (1993) as somehow undermining or even overruling *sub silentio* decisions such as *Thornburg v. Gingles*, 478 U.S. 30 (1986) that have given meaning and substance to the Voting Rights Act. This Court should make clear that the obligations of that Act as interpreted by the courts remain as clear as before. To do otherwise would result in:

> . . . serious inequity to those who have relied upon them [and] significant damage to the stability of the society governed by [their] rule . . . .

Planned Parenthood v. Casey, 505 U.S. ___, 120 L. Ed. 2d 674, 700 (1992).

For the foregoing reasons, the decision of the court below should be reversed.

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[32] *Cf.* Hon. George C. Pratt, Symposium, *The Supreme Court and Local Government Law, The 1992 Term*, 10 TOURO L. REV. 295, 454-55 (1994) (discussing general acceptance of legal framework in New York City and New York state redistricting after the 1990 census, based upon Judge Pratt's experience on panels hearing such cases).

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In The
Supreme Court of the United States

October Term 1994

UNITED STATES,
Appellant,
v.
RAY HAYS, *et al.*,
Appellees.

STATE OF LOUISIANA, *et al.*,
Appellants,
v.
RAY HAYS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF OF THE CONGRESSIONAL BLACK CAUCUS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTERESTS OF AMICUS CURIAE

The Congressional Black Caucus (the "Caucus") is composed of all forty African Americans who have been elected to the House of Representatives and, in addition, Carol Mosely Braun of Illinois, a member of the United States Senate. The issue as to how congressional boundaries are drawn in Louisiana and throughout the nation could affect directly twenty or more members of the present Caucus and millions of African Americans and other minorities who reside in the minority-majority districts where the issue has been or may be raised. The Caucus filed an *amicus* brief in the proceedings below.

ARGUMENT

I.

SUMMARY OF ARGUMENT

The Caucus believes that the minority-majority districts in issue in this and related cases are indispensable in the fight for full integration of the American political landscape. Minority-majority districting is only a specific illustration of the more general goal of *all* districting, particularly single-member districting: it is intended to allow the direct representation of numerical minorities whose votes otherwise would be submerged by those of the majority. In the context of American history and contemporary reality, minority-majority districts are often the only way of fully achieving the pluralist aspirations of American politics and remedying the longstanding exclusion of African Americans from full participation in government. Moreover, the use of minority-majority districts, like Louisiana's District Four and the other minority-majority districts represented by members of the Caucus, shows that these districts have not resulted in the harms this Court feared from race-conscious districting; the challenged districts do not segregate voters on the basis of race, and representatives from minority-majority districts fairly represent the interests of *all* their constituents—regardless of race.

This Court's decision in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), nevertheless has unleashed a torrent of litigation challenging minority-majority congressional districts drawn after the 1990 census. In three cases, lower federal courts have used *Shaw* as a roving warrant to flout Congress's commitment to full integration of the political system. In so doing, these lower courts have disregarded this Court's reluctance to interfere in the intensely political process of districting, which inevitably involves "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).

Shaw reflects this Court's hopes and its fears about the American political system. *Shaw* confirms this Nation's deep commitment to integration of the political system. The Fourteenth and Fifteenth Amendments to the Constitution expressly pledge to eradicate the political exclusion of racial minorities, particularly African Americans. *See Shaw*, 113 S. Ct. at 2822-31. This constitutional command underlies the Voting Rights Act of 1965, which gives all Americans an "equal opportunity to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (1988). Moreover, as *Shaw* recognizes, the political system should ensure that elected officials are responsive to the needs of all of their constituents; no official should ignore the distinctive needs of the citizens he or she represents because of their race. *See Shaw*, 113 S. Ct. at 2827. Finally, *Shaw* expresses an aspiration for American politics to become less race-conscious and polarized. *See id.* at 2827, 2832.

At the same time, *Shaw* sets forth several reservations about the deliberate creation of irregularly-shaped, minority-majority districts. *Shaw* foresees two potential dangers in such districts. *First*, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group rather than their constituency as a whole." *Id.* at 2827. *Second*, to the extent that such districts reinforce stereotypes about racial distinctions, they may "exacerbate...patterns of racial bloc voting," *id.*, and further polarize American politics.

It is the position of the Caucus that the opinion and order of the *Hays* trial court is inconsistent with this Court's opinion in *Shaw.* The lower court failed to recognize that the challenged minority-majority district meets the aspirations for the American political system identified in *Shaw.* Further, the court below failed to assess the fears noted in *Shaw.* Such inquiry would have revealed that Louisiana's District Four does not present either danger. The lower court decision should be reversed. If, however, the Court concludes that the decision below is consistent with or required by *Shaw*, we submit that the *Shaw* decision was "wrongly decided," and should be revised.[1]

II.

MINORITY-MAJORITY DISTRICTS ARE A CRITICAL TOOL FOR ACHIEVING AN INTEGRATED POLITICAL SYSTEM

For far too long, this nation was unresponsive and often hostile to the needs of its African-American citizens. Prior to Reconstruction, and the passage of the Fourteenth and Fifteenth Amendments to the Constitution, no African American served in Congress. By 1901 (the end of the First Reconstruction), the massive disfranchisement of African-American voters through fraud, intimidation, and a variety of invidiously discriminatory devices (such as poll taxes and literacy tests) had entirely purged Congress of African-American members. From 1901 to 1928, there were no African Americans in Congress; from 1929 to 1944 there was but one. And the voice of Congress's sole African-American representative from 1935 to 1943, Arthur Mitchell of Illinois, was all but silenced by the antagonistic posturing of his white colleagues—some of whom were members of his own party.[2]

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[1] In *Fullilove* v. *Klutznick*, 448 U.S. 448, 522 (1980), Justice Rehnquist joined Justice Stewart's view that "*Plessy* v. *Ferguson* was wrong when decided." This view has been endorsed by two members of the *Shaw* majority. *See Planned Parenthood* v. *Casey*, 112 S. Ct. 2791, 2813 (1993) ("[W]e think *Plessy* was wrong the day it was decided.") For an argument that *Shaw* was wrongly decided, *see* A. Leon Higginbotham, Jr., G. Clarick & M. David, *Shaw* v. *Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Rev. 1593 (1994).

The consequences of the exclusion of African Americans from voting and thus from Congress were painfully visible, even after World War II, as Congress consistently worked to advance the interests of the white majority at the expense of minority groups. Thus, for example, in 1957 southern congressmen almost uniformly joined the "Southern Manifesto," rejecting the doctrine of *Brown* v. *Board of Education* and adhering solely to the interests of those white constituents who wanted to maintain segregation in America—to the detriment of a significant African-American southern population.[3]

Louisiana's District Four and other challenged minority-majority districts have served to move America beyond this deplorable history and toward the ideal of a representative democracy, one that encourages the inclusion of *all* Americans in political discourse. Progress has been slow in coming. Indeed, only after the 1992 congressional elections did the number of African-American members of Congress rise from 26 to 40. Absent the minority-majority districts that facilitated this change, however,

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[2] During the Democratic Party convention of 1936: "Congressman Mitchell's presence on the podium...was used as an excuse for a U.S. senator from South Carolina and eight other delegates to stage a walkout in protest. But even that demonstration was mild compared to what had happened in previous conventions...." William L. Clay, *Just Permanent Interests: Black Americans in Congress 1870-1991* 72 (1992).

For a list of African Americans who have served in Congress, *see* Appendix A hereto.

[3] Nineteen senators and 83 representatives from the South, with approximately 9 million African-American constituents, joined the Manifesto. *See* Norman Dorsen *et al.*, 2 *Political and Civil Rights in the United States* 625 n.2 (4th ed. 1979) (for history of manifesto); George T. Kurian, *Datapedia of the United States: 1790-2000* 18-26 (1994) (for southern population).

America cannot realistically hope soon to achieve a racially integrated legislature that adequately allows for the expression of the experiences and views of *all* Americans. Decisions such as the district court's opinion in this case ignore the crucial importance of achieving a racially integrated legislature in a multiracial nation.

A. The Central Purpose of Single Member Congressional Districts is to Achieve Representation of Minority Groups

Nothing in the Constitution requires congressional representatives to be elected from single-member districts. Nevertheless, single-member districting, which has been required by federal statute since 1842, serves a critical function: the direct representation in Congress of communities with distinct political interests that otherwise would be unrepresented were elections conducted on an at-large basis. Single-member districts promote a diversity of experience, insight and outlook in Congress that both results in better and more representative lawmaking and promotes citizen confidence in the legitimacy of the legislative process.

Single-member congressional districts were first mandated by the Reapportionment Act of 1842. This Act advanced James Madison's notion that single-member districts would best allow for the representation of local communities. As Madison explained in Federalist Paper 56:

> Divide the largest state into ten or twelve districts and it will be found that there will be no peculiar local interest...which will not be within the knowledge of the Representative of that district.

Indeed, the committee forwarding the 1842 Act explicitly intended the single-member districts to enable minorities to have representation in the face of differing majorities. That committee explained:

> [At-large elections] stifl[e] the voice and smother[] the opinions of minorities...thus disfranchised by the overbearing insolence of a majority, always

> meager, and as it grows leaner growing more inexorable and oppressive.

H.R. Rep. 909, 27th Cong., 2d Sess. at 8 (1842).

Thus the overriding purpose of single-district voting is to enhance pluralism in Congress by promoting the grouping and political participation of various communities in American democratic life. Louisiana's District Four and other challenged minority-majority districts advance this purpose, by including the views and protecting the interests of a distinct minority group, African Americans. Only a pluralistic Congress—one that includes the presence of legislators of various backgrounds—can fairly ensure that all appropriate interests are considered, as the government forges policies that dramatically affect the lives of all American citizens, including those who are members of minority groups.

B. Groups Defined by Reference to Religious, Racial, Ethnic, and Socioeconomic Status Form the Building Blocks of Our Pluralist Democracy

As Justice O'Connor recognized in her concurring opinion in *Davis v. Bandemer*, 478 U.S. 109, 147 (1986), the reapportionment process has traditionally involved political accommodation of the "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." In the context of America's unique history, it is essential that this Court recognize that African Americans often form a community with distinct political interests.

One key source of African Americans' commonality of interests is, of course, this Nation's lamentable history of overt racial discrimination.[4] African Americans were enslaved,[5] and later denied the rights to purchase property or live in certain areas,[6] learn,[7] work,[8] travel with dignity,[9] marry,[10] and vote,[11] simply because of the "color of their skin." *Shaw*, 113 S. Ct. at 2827.

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[4] *See generally* John Hope Franklin, From Slavery to Freedom (7th ed. 1994); Gunnar Myrdal, *An American Dilemma* (1944).

[5] *See Dred Scott* v. *Sandford*, 60 U.S. 393, 407 (1857) ("[A]t the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted ... [African Americans] had no rights which the white man was bound to respect."); *see also* A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process* 6 (1978).

[6] *See Buchanan* v. *Warley*, 245 U.S. 60, 79 (1917) (municipal racial segregation law); *Shelley* v. *Kraemer*, 334 U.S. 1, 20 (1948) (racially restrictive covenant); *see also*, John Hope Franklin, *supra* note 4, at 311; A. Leon Higginbotham, Jr., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 4 Univ. Ill. L. Rev. 763 (1990).

[7] *See Cumming* v. *Board of Educ.*, 175 U.S. 528, 545 (1899) (Board of Education suspended "temporarily and for economic reasons the high school for colored children"); *Gaines* v. *Canada*, 305 U.S. 337, 352 (1938) (black citizens of Missouri denied the right to attend the only state supported law school); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (racial segregation in public schools); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools).

[8] *See Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (blacks denied membership in labor union on account of race); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944) (racially discriminatory bargaining agreement); *see also* John Hope Franklin, *supra* note 4, at 235.

[9] Even the one African-American in Congress in the 1930s was denied the right to travel with dignity. As Congressman Arthur Mitchell testified, after he identified himself as a U.S. Congressman to a train conductor in Arkansas, the conductor said "it didn't make a damn bit of difference who I was, that as long as I was a nigger I couldn't ride in [the first class] car." Record of the United States Supreme Court, *Mitchell* v. *ICC*, 313 U.S. 80 (1941) (No. 577), at 79, and *Mitchell* v. *ICC*, 313 U.S. 80, (1941) (denial of "separate but equal" first-class railroad accommodation to African Americans); *see also Plessy* v. *Ferguson*, 163 U.S. 537, 540 (1896) (Louisiana's racial segregation of railroad passengers); *Civil Rights Cases*, 109 U.S. 3 (1883) (same).

Nor is this legacy ancient history. The continuing effects of this state-sponsored history of slavery, *de jure* segregation, brutality, and exclusion from voting persist. Many middle-aged African Americans attended inferior, racially segregated schools and their substandard educations continue to hamper their ability to compete in the workforce, to afford adequate housing, and to participate effectively in the political process.[12] Even today, white attitudes hardened by state-sponsored *de jure* segregation often result in racially polarized voting and contribute to discrimination in employment, housing, public accommodations, and a variety of other circumstances.

Federal legislation has been an essential weapon in the fight to remedy the effects of this past and continuing racial discrimination, and Congress's use of its Fourteenth and Fifteenth Amendments and Commerce Clause powers to fight for racial justice has been a significant element of the legislative agenda of the past three decades.[13] Of course, Americans of all races have

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[10](...continued)

[10] *See Loving* v. *Virginia*, 388 U.S. 1 (1967) (Virginia's anti-miscegenation statute).

[11] *See Hobbs* v. *Fogg*, 6 Watts 553 (Pa. 1837) (African Americans in Pennsylvania denied the right to vote on account of race); *Giles* v. *Harris*, 189 U.S. 475 (1903) (Alabama Constitution denied African Americans the right to vote on account of race); *see also South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (setting out history of racial discrimination in voting).

[12] *See* John Hope Franklin, *supra* note 4, at 405-32.

[13] *See* Civil Rights Act of 1964, 18 U.S.C. §§ 372, 2384; 28 U.S.C. §§ 1343, 1443, 1446; 42 U.S.C. §§ 1991 *et seq.* (1988); Equal Employment Opportunity Act, 42 U.S.C. § 2000e *et seq.* (1988); Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (1988); Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973 *et seq.* (1988); Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.* (1988); Fair Housing Amendments Act of 1988, 28 U.S.C. §§ 2341-2342 (1988); Civil Rights Act of 1991, 5 U.S.C. § 5315; 18 U.S.C. § 241 *et seq.*; 20 U.S.C. §§ 241, 640;
(continued...)

supported these remedial measures. Nevertheless, African-American constituents, witnesses, and representatives have been in the forefront of these legislative efforts.

Even beyond explicitly race-conscious legislative measures, African Americans often form discrete communities of interest. Recognition of this thread of shared interests does not involve the type of pernicious stereotyping referred to by this Court in *Shaw*. *See* 113 S. Ct. at 2827. African Americans, enslaved and segregated because of their race, were excluded from the dominant American culture and forced to develop distinct cultural traditions, woven together from the strands of the disparate African traditions of their homelands. The result is indubitably, uniquely, and recognizably African American. It includes the literature of Richard Wright, Ralph Ellison and Toni Morrison, the poetry of Phyllis Wheatley and Langston Hughes and art forms such as blues, gospel and jazz.[14/] African-American culture is also uniquely expressed in painting, sculpture, film and dance. Similar to other ethnic, religious, and occupationally-defined groups, African Americans, who share a common cultural heritage, often share a common perspective on many issues the government faces—ranging from political solidarity with the people of certain foreign countries to support for particular foreign and domestic, economic and cultural policies.

There are numerous examples of how commonality of culture influences American politics. Over the years, Irish-

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[13/] (...continued)
28 U.S.C. §§ 1343, 1447, 1861; 42 U.S.C. §§ 1971 *et seq.*, 1973 *et seq.* (1988); Civil Rights Restoration Act of 1991, 20 U.S.C. §§ 1687, 1688; 29 U.S.C. §§ 706, 794; 42 U.S.C. §§ 2000d-4a, 6107 (1988); Comprehensive Anti-Apartheid Act of 1986, 12 U.S.C. § 635; 22 U.S.C. §§ 2151c, 2151n, 2151o, 2346d, 5001 *et seq.* (1988).

[14/] *See generally* 27 *Eighteenth-Century Studies* No. 4, *Special Issue: African-American Culture in the Eighteenth Century* (1994); Talmadge Anderson, *Introduction to African American Studies* 251-82 (1993); Roger D. Abrahams, *Singing the Master: The Emergence of African American Culture in the Plantation South* (1992).

American members of Congress and representatives from constituencies with significant Irish-American populations have developed particular interest and expertise in issues connected with Northern Ireland.[15] Similarly, Jewish-American legislators and representatives with large numbers of Jewish-American constituents have been especially active in issues involving the Middle East.[16]

Like these other minority groups, in recent years, members of the Caucus have labored to advance interests of particular concern to African Americans. Caucus members thus have taken a leading role in debating American policy with regard to South Africa and Haiti. For example, the Caucus successfully pressed for a more equitable application of American foreign policy to the Haitian refugee crisis, by bringing to the fore the disparity between the Clinton Administration's policy with respect to the treatment of Cuban and Haitian immigrants. The Caucus's role in such affairs is appropriate and critical.[17]

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[15] For example, Sen. Edward Kennedy, of Massachusetts, has often spoken out regarding affairs in Northern Ireland. *See, e.g., Dublin Journal: A Kennedy Pleases the Irish, Piques Some Envoys*, N.Y. Times, July 29, 1994, A4; *Political Leader of I.R.A. Begins a Tour of the U.S. in Boston*, N.Y. Times, Sept. 25, 1994, at 13; *Bay State Delegation Arrives in Ireland to Meet Leaders*, The Boston Herald, Dec. 11, 1994, at 2.

[16] For example, Rep. Charles Schumer, of New York, has regularly promoted favorable relations with Israel. *See, e.g., Baxter International Settles Boycott Case—Firm Fined $6 Million for Aiding Arab League*, Wash. Post, Mar. 26, 1993, at D1.

[17] *Cf. Haitian Refugee Center, Inc.* v. *Baker*, 112 S. Ct. 1245, 1246 (1992) (Thomas, J., concurring in denial of *certiorari*) (the matter of Haitian refugees "must be addressed by the political branches").

A similar dynamic is evident with regard to female representatives. Last year's debate over whether the naval commander in charge during the infamous "Tailhook Scandal" should be retired at full rank provides an example of the significance of even a small coalition of women: it transformed what otherwise would have been a *pro forma* exchange into a national debate on gender relations. *See* Maureen Dowd, *Senate Approves a 4-Star Rank for Admiral in Tailhook Affair: 54–43 Vote Followed Heated Debate on Floor*, N.Y. Times, Apr. 20, 1994, at (continued...)

Similarly, on the domestic front, the Congressional Black Caucus worked to raise concerns about the fairness of the recent crime bill. Ultimately, most African-American representatives voted in favor of the bill, even though a Caucus-sponsored amendment concerning racism in death penalty sentencing was defeated.[18]

But the importance of having a racially integrated Congress in a multi-racial society goes far beyond African-American representatives' decisive role in a few identifiable debates of particular importance to the African-American community. As this Court has repeatedly emphasized in cases involving juries, the very notion of "representativeness" requires that no significant group be excluded from the deliberative process. As Justice Marshall explained in *Peters* v. *Kiff*, 407 U.S. 493, 503 (1972):

> We are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded...the effect is to remove from the...room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury [or Congress] of a perspective on human events

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[17](...continued)
A1, B10. The further representation of women's interests—by women—in the Senate would no doubt have further altered the tenor and perhaps the outcome of that debate.

[18] *See The Crime Bill: The Roll Call of the House on the Crime Measure*, N.Y. Times, Aug. 22, 1994, at B6; K. Seelye, *Provision on Racial Bias in Death Sentence Appears Unlikely for Crime Bill*, N.Y. Times, July 14, 1994, at D3.

> that may have unsuspected importance in any case that may be presented.[19]

Indeed, in *J.E.B.* v. *Alabama*, 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (emphasis added), Justice O'Connor recognized that in the context of jury deliberations, "[w]e know that *like race*, gender matters...[j]urors are not expected to come into the jury box and leave behind all that their human experience has taught them." Thus, African-American representatives perform an essential function in the deliberative processes connected with the proposal, assessment and enactment of legislation of all kinds.

Moreover, as the jury cases make clear, an African-American presence may also be essential to public perceptions of congressional legitimacy. *See J.E.B.*, 114 S. Ct. at 1429; *Powers* v. *Ohio*, 499 U.S. 400, 407 (1991) (jury service "ensures continued acceptance of the laws by all of the people"). Again, a foreign policy issue illustrates the point. During the 1991 Gulf War, Congress was faced with the decision whether to commit American forces—forces that are disproportionately black and poor—to combat. The congressional debate regarding the deployment of troops to Iraq was criticized as potentially illegitimate and unfair precisely because the composition of Congress did not accurately reflect the composition of the community from which the soldiers sent into combat would come.[20] Increasing the number of African-American legislators in Congress is essential to the perceived legitimacy of the decisions that that body makes, particularly those which disproportionately effect the lives of African-American citizens.

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[19] This Court's frequently cited discussion in *Ballard* v. *United States*, 329 U.S. 187, 193-94 (1946), with respect to juries and gender equally pertains to legislatures and race:

> [I]t is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

See also Taylor v. *Louisiana*, 419 U.S. 522, 531-32 (1975) (quoting *Ballard*).

Failure to ensure pluralism also limits the input of diverse outlooks in congressional debate, impairing Congress's insight into the problems facing the Nation. Such diverse input is crucial to combating the preconceived notions and unconscious prejudices of legislators. Pluralism thus permits the mutual education of individuals. Minorities learn of the concerns and fears of majorities, while majorities learn of the lives of others and experiences that they may well be unable to imagine. And, we believe, over time, more inclusive legislative bodies will enact laws that will increase integration within society.

Of particular salience to the case before the Court is the fact that the commonalities of African-American culture and political interests permeate the community of Louisiana's African Americans. The political cohesiveness of Louisiana's African-American population has been well documented. *See, e.g., Citizens for a Better Gretna* v. *City of Gretna*, 636 F. Supp. 1113, 1124-26 (E.D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989); *Major* v. *Treen*, 574 F. Supp. 325, 351 (E.D. La. 1983). It is, of course, no surprise since Louisiana's African-American citizens are disproportionately undereducated, living in poverty, unemployed and ill-housed. *See Major*, 574 F. Supp. at 351.

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[20] As noted by the New York Times:

> Close to 30 percent of the Army's troops in Operation Desert Storm are black, though blacks are just 14 percent of the nation's population between 18 and 24. In a land war, black casualties will be similarly disproportionate. Is it fair? Is it inevitable? For answers, one must search the soul of American society.

The Killing Fields Aren't Level, N.Y. Times, Jan. 28, 1991, at A2.

Despite this clear community of interest, the court below refused even to consider the "past and present reality" of the African-American experience. *Thornburg* v. *Gingles*, 478 U.S. 30, 45 (1986). Rather, the trial court endorsed an unprincipled, dualistic standard, recognizing the political cohesiveness of certain white communities but not that of Louisiana's African-American community. The "traditional" ethnic interests of Louisiana's "English-Scotch-Irish" and "Continental French-Spanish-German Roman Catholic" communities, one concurring judge stated, may be used to draw congressional district lines. In that judge's view, these uniformly white communities are entitled to representation precisely because of commonalities of interest arising from their ethnicity, but the interests of Louisiana's African-American community are not entitled to equal recognition or respect.[21] This distinction—which is not and cannot be explained—turns the Fourteenth Amendment completely on its head. In this view, *only* African Americans are barred from creating districts that empower their community. Other racial, ethnic, and religious groups are entitled to draw such districts. Thus, the original intended beneficiaries of the Fourteenth Amendment—African-American slaves and their descendants—would be punished by that very Act. This is not the law and the Court must unequivocally reject the lower court's infirm logic.

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[21] The trial court insisted that the state, in its two districting attempts, had "classified its citizens along racial lines" and "cut[] across historical and cultural divides." (App. 15) The "traditional" ethnic interests violated were, in the trial court's view, those of the "English-Scotch-Irish," "mainline Protestants," "Continental French-Spanish-German Roman Catholics," and "*sui generic* Creoles." *Hays I*, App. 66; *see also Hays II*, App. 15 (concurring opinion of Shaw, J.) The court recognized African-American traditions only insofar as they are modified by "traditional" religious interest. *Hays I*, App. 66 (recognizing "traditional rural black Protestants" and "South Louisiana black Catholics").

C. Given Present-Day Political Realities, Genuine Integration Requires the Use of Minority-Majority Districts

As we have already pointed out, between the end of Reconstruction and the passage of the Voting Rights Act, Congress, like most other American institutions, was racially segregated. African Americans were almost entirely excluded. Moreover, as this Court recognized in *Shaw*, the formal enfranchisement of African Americans after 1965 did not actually remedy continued African-American exclusion from the halls of government. *See Shaw*, 113 S. Ct. at 2823; *see also Thornburg* v. *Gingles*, 478 U.S. 30 (1986); *Johnson* v. *De Grandy*, 114 S. Ct. 2647 (1994). Districting practices interacted with racial bloc voting to dilute the voting strength of African-American voters residing within majority-white districts.

As *Shaw* recognized, all districting is race-conscious "in that the legislature is always *aware* of race when it draws district lines...." 113 S. Ct. at 2826. As the State explains in its brief, there are no dispositive districting criteria that require one set of districts be chosen over all other possible plans. Thus, absent minority-majority districts, it is statistically unlikely that even a few, if any, minority-majority districts would be created.[22] And the brutal truth of contemporary American politics is that, absent minority-majority districts, African-American representation would virtually disappear from Congress. There are 40 African-American members of the House of Representatives. Only two were elected from majority-white districts. Not a single African-American representative from the Deep South states covered by Section 5 of the Voting Rights Act was elected from a majority-white district.

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[22] This point is not undermined by the statement in *Wright* v. *Rockefeller*, 376 U.S. 52, 56-58 (1964), relied on by this Court in *Shaw*, 113 S. Ct. at 2826, that it would have been difficult to draw congressional districts in Manhattan without "concentrations of nonwhite voters." While it might have been difficult to create four districts with equal proportions of nonwhite voters, it would have been entirely possible to create four districts all of which had a white majority.

This pervasive phenomenon describes state legislative elections as well. A recent exhaustive scholarly study of the impact of the Voting Rights Act showed that during the 1980's only *one percent* of majority-white southern state legislative districts elected African American representatives. By contrast roughly a quarter of African-American majority districts elected white representatives.[23]

Louisiana is no exception to this lamentable pattern of racial bloc voting.[24] Indeed, Louisiana provides a textbook example of the necessity of race-conscious minority-majority districting to achieve integration of the political process. One study, a 1988 comparative analysis of southern legislatures and congressional delegations, found that no African-American state legislator was elected from a white-majority district in Louisiana.[25] Another study looked at city councils in Louisiana cities that had more than 2500 residents and whose voting-age population was more than 10% African American. Only four percent of the representatives elected from white-majority districts were African-American; by contrast 98% of those elected from African-American districts were African American.[26]

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[23] *See* Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations" in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, at 335, 345 (C. Davidson & B. Grofman eds. 1994).

The absence of African-American representatives from majority-white districts cannot be ascribed to the placement of all African-American voters in minority-majority districts. A significant number of African-American voters live in majority-white districts, *see id.* at 338, but such districts nonetheless elected only white representatives almost without exception, *see id.*

[24] The prevalence of racial bloc voting in Louisiana is the latest manifestation of Louisiana's centuries-long effort to disfranchise African Americans. Louisiana's modern history of disfranchising African Americans commenced soon after Reconstruction, galvanized by the fact that African Americans constituted more than 44% of Louisiana's registered voters. *See* R. Engstrom *et al.*, "Louisiana," in *Quiet Revolution in the South*, 104 (C. Davidson & B. Grofman eds. 1994). By the close of the century, direct prohibitions on black voting (including literacy and property tests) were firmly ensconced in Louisiana's laws, after a constitutional convention, the purpose of which was "to establish the supremacy of the white race." *United States* v. *Louisiana*, 225 F. Supp. 353, 371 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

By 1900, voter registration among African Americans in Louisiana had tumbled from 130,344 to 5,320, which represented just four percent of Louisiana's registered voters. By 1910, African-American registration had further plummeted to a mere *730 voters*. *Id.* at 374. This exclusion continued throughout the first half of the century. On the eve of the adoption of the Voting Rights Act in 1965, African Americans represented only 13.7% of registered voters in Louisiana although they were more than 30% of the state's population. *See* Engstrom, *supra*, at 134 (Table 4.1).

Three recent major state-wide elections demonstrate that race is still the driving force in Louisiana politics. In two races—first for U.S. Senate and then for governor—white supremacist David Duke ran disturbingly successful campaigns based implicitly, if not explicitly, on the resurgence of white supremacy. In both elections Duke's racist views were well-publicized; in both elections, Duke garnered nearly 60% of the white vote.[27] In March 1994 Marc Morial, an African-American state senator, was elected Mayor of New Orleans against David Mintz, after a race dominated by allegations that the Mintz campaign had distributed anonymous fliers attacking black people.[28] Morial received 91% of the black vote, while Mintz received 90% of the white vote.[29]

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[25] *See* Handley & Grofman, *supra* note 23, at 338, 346 (Tables 11.3, 11.4).

[26] *See* Engstrom, *supra* note 24, at 103, 132.

[27] *See* J. Wardlaw, *Johnson Beats Duke for Senate*, New Orleans Times-Picayune, Oct. 7, 1990, at A1 (reporting election for Senate); J. Wardlaw, *It's Edwards—Heavy Voter Turnout Buries Duke*, New Orleans Times-Picayune, Nov. 17, 1991, at A1.

Notably, when the court below imposed its own, judicially-invented apportionment plan on the State of Louisiana, David Duke crowed that one of the plan's districts was "tailor made" for his candidacy. *See* Elaine Jones, *In Peril: Black Lawmakers*, N.Y. Times, Sept. 11, 1994, Sec. IV. at 19.

The bottom line is this: from our own experience, the members of the Caucus have seen the tangible and intangible differences the presence of substantial numbers of African Americans make in the work of Congress. We also know, as practical politicians aware of the voting behavior of citizens inside and outside our districts, that minority-majority districts are the only way of providing African-American voters with an opportunity to elect the representatives of their choice. Thus, if the American political system is to achieve real integration at all levels of the political process while continuing to use single-member districts to elect congressional representatives, race-conscious minority-majority districts are essential.

III.

MINORITY-MAJORITY DISTRICTS LIKE LOUISIANA'S DISTRICT FOUR NEITHER SEGREGATE VOTERS NOR IMPAIR FULL REPRESENTATION OF ALL CONSTITUENTS' INTERESTS

Shaw identified several potential dangers that the deliberate creation of "bizarre," "highly irregular" or "tortured" minority-majority districts might cause. *See Shaw*, 113 S. Ct. at 2825-27. For the reasons set out at length in the State's brief, the Caucus believes that Louisiana's District Four does not fall within this suspect category; that district adheres to many traditional districting criteria and is no more irregular or bizarre than past Louisiana congressional districts. Nevertheless, an assessment of the fears noted by the *Shaw* Court—an assessment all but abandoned by the court below—reveals that Louisiana's District Four does not foster any detrimental result.

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[28] R. Theim, *It's Morial! Sweeping Victory Caps Dirty Campaign*, New Orleans Times-Picayune, March 6, 1994, at A1.

[29] C. Warner, *Racial Concerns Swung Key Voters*, New Orleans Times-Picayune, March 6, 1994, at A1. Although Morial's victory may forward the cause of African Americans in New Orleans, the extreme racial polarization of the electorate does not portend the entrance of blacks into the mainstream of Louisiana politics.

Shaw's use of the word "segregate" makes clear the Court's concern that race-conscious districting may somehow separate voters by race and limit voters' decisions about whom to support and how to conduct their everyday affairs, as well as affect public officials' behavior after an election is over. The Caucus submits that, under current conditions, neither Louisiana's District Four nor the other minority-majority districts challenged in the wake of *Shaw* in fact give rise to the potential harms hypothesized by the Court.

A. Contrary to the Suggestion of Segregation, the Challenged Congressional Districts Are Among the Most Racially Integrated Districts in the Nation

Large numbers of whites and African Americans live in racially segregated neighborhoods. This neighborhood-level segregation is the product of many factors, including past and present racial discrimination, as well as varying economic opportunity. Not surprisingly, then, many congressional districts are racially segregated. Their populations are either overwhelmingly white, African American or Hispanic.[30] Ironically, neither this nor any other pending voting rights case has challenged the legality of these districts based on their segregated characteristics.

Rather, districts such as Louisiana's District Four are under siege. District Four, and the other challenged minority-majority districts, however, are among the *least* segregated districts in the

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[30] For example, 28 congressional districts in the South are more than 90% non-Hispanic white. *See* David Bositis, *Redistricting and Representation: The Creation of Majority-Minority Districts in the South, The Evolving Party System and Some Observations on the New Political Order* 26 (The Joint Center for Political and Economic Studies 1994).

Nation. Unlike the vast majority of congressional districts, these districts are racially diverse rather than homogeneous. Indeed, while the trial court concluded that District Four "[s]eparate[s]... [d]ivide[s]...[and] [s]egregate[s]," *Hays II*, App. 11, Louisiana's African-American citizens from other citizens, in truth the district is characterized by a significant degree of racial integration. Only slightly more than half of that district's voters—55%—are African American, while 45% are white. Further, as the trial court noted, Louisiana boasts a large African-American population dispersed across the state, the majority of whom live outside of District Four.[31]

Other challenged districts are no less integrated. North Carolina's Districts One and Twelve, both maligned as segregated, are similarly integrated, each with voting age populations of approximately 53% African American, 46% white and 1% Hispanic. Texas' District Eighteen is a coalition of voters: 49% African American, 37% white and 14% Hispanic, and District Thirty is similarly integrated. The distribution of the voting-age residents of Georgia's Eleventh District is 60% African American, 39% white and 1% Hispanic. When these districts are compared to some of their white-majority counterparts, such as North Carolina's Fifth, which is 85% white, or Texas's Fourth, which is 89% white, or Georgia's Ninth, *which is 94.9% white*, the integrated nature of these districts and of District Four is clear.[32]

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[31] The trial court's plan created a minority-majority district in southern Louisiana, centered around New Orleans. The suggestion that that district, although it has a similar ethnic distribution as District Four, is not segregated simply because of its regular boundaries, is logically insupportable.

[32] *See* Higginbotham *et al.*, *supra* note 1, at 1653-57 Apps. E & F (for racial composition of southern congressional districts).

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The very language of the lower court in this case used to *condemn* the Fourth District in fact illustrates its integrated character:

> District 4 includes North Louisiana English-Scotch-Irish, mainline Protestants, South Louisiana French-Spanish-German Roman Catholics, traditional rural black Protestants, and Creoles. The district encompasses North, Central, and South Louisiana, each of which has its own unique identity, interests, culture, and history. The agricultural regions of District 4 include cotton, soybean, rice, sugar cane, timber.

Hays II, App. 15-16 (concurring opinion). In light of this characterization, how could the district court have concluded that District Four is segregated? How could it defend the districting plan it drew, in which six of seven districts have a substantial white majority? The district court's answer appears chilling: *districts that have even the slightest majority of African Americans are segregated, while white-majority districts are integrated*. This Court must unequivocally reject this pernicious view.

Far from increasing segregation within the political process, the challenged minority-majority districts are integrated. Further, there is no danger that these districts will cause racial segregation. As an empirical matter, citizens simply do not choose where to live based on congressional district lines. *See Shaw* v. *Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994). Thus, the Voting Rights Act and reapportionment more generally will not affect residential patterns. Minority-majority districts, in other words, do not exacerbate existing segregated residential patterns. Contrary to Judge Walter's charge that districts like the Louisiana Fourth "say now: 'Separate!' 'Divide!' 'Segregate!'," *Hays II*, App. 11, these districts bring together African-American and white voters and do nothing more than recognize that, at the neighborhood level, Louisiana, like many other states, is *already* separated and segregated, and Louisiana voting patterns are already divided along racial lines.

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B. The Representatives Elected From the Challenged Districts Faithfully Represent the Interests of All Their Constituents

The other danger this Court identified in *Shaw* was that representatives elected from "bizarre" minority-majority districts might ignore the needs of constituents who are not members of the racial majority within their districts. Given legislators' inevitable awareness of the racial composition of their districts, *see Shaw*, 113 S. Ct. at 2826, however, this danger obviously exists regardless of the shape of the district that elected them, the racial component of the majority, and the race of the elected representative. Surely this Court does not suppose that African-American representatives from minority-majority districts are inherently less likely than their white counterparts to represent all their constituents fairly.[33]

In fact, members of the Caucus represent *all* the residents of their districts, whatever their race. Our doors are always open to all constituents.[34] We perform the traditional constituent service functions with the same vigor for white constituents as we do for African-American constituents. We also zealously represent the geographically defined interests of our districts—for instance, the needs of particular employers or industries.

Moreover, it would be illogical to conclude that the representatives elected from the Louisiana's District Four or other minority-majority districts pursue only a "racial agenda." Congressional representatives have voting responsibility on a wide range of issues. While some of those issues, such as health care, crime control and welfare reform, are issues about which African Americans have strong concerns, solutions to these issues are not approached on the basis of race. Indeed, by all assessments, the African-American representatives of the 103rd Congress acted ably and fairly to represent the interests of all of their constituents.[35]

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[33] The implication that white representatives elected from white-majority districts can adequately and fairly represent the interests of their minority constituents, but that African Americans or other minorities cannot represent the interests of white constituents, is indefensible. In fact, this nation's experience has been to the contrary: for centuries many white legislators at all levels of government acted against the interests of their African-American constituents.

[34] Compare *Jeffers* v. *Clinton*, 730 F. Supp. 196, 214 (E.D. Ark. 1989) (white state legislators in Arkansas sent black constituents from their own districts to seek assistance from African-American representatives elected from other districts), *aff'd*, 498 U.S. 1019 (1991) .

C. Minority-Majority Districts Do Not Increase Racial Polarization

Nothing in the record in this case or in any of the other cases that have followed *Shaw* has provided even the slightest empirical support for the proposition that race-conscious districting has increased the levels of racial-bloc voting within minority-majority districts. Indeed, our experience suggests the contrary with regard to the attitudes of white voters. Familiarity with black elected officials, breeds content, not contempt: white voters are far *more* likely to vote for African-American incumbents than they are for African Americans seeking open seats.

The reasons, as the previous section of this brief suggests, are not hard to fathom. Our constituent service, our championship of the diverse interests of our districts' citizens, and our fidelity to the public interest show our white constituents that African-American elected officials will represent them fairly and diligently. Thus, virtually *all* of us have received increased support from the white community over time. If anything, then, our districts have decreased the levels of racial polarization or balkanization in American society.

CONCLUSION

This case raises fundamental issues concerning our representative democracy. To forge their view of American democracy, appellees conjure a utopia—a color-blind society—where an individual's race has little impact on his or her life, where the race of a candidate for political office does not influence citizens' voting behavior and where African Americans do not have shared political interests simply because of the color of their skin. This is our dream too. As the poet Langston Hughes eloquently wrote:

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[35] *See* Bositis, *supra* note 30, at 29-30.

> I dream a world where all
> Will know sweet freedom's way
> Where greed no longer saps the soul
> Nor avarice blights our day
> A world I dream where black or white,
> Whatever race you be,
> Will share the bounties of the earth
> And every man is free.[36]

But this dream cannot substitute for reality in interpreting the Constitution today, at a time when the United States has not yet attained this hopeful vision. The realities are that race matters; that voting is racially polarized; that the color of a candidate's skin does affect voting; that many African Americans do have shared political interests. In light of these realities, the necessity of minority-majority districting to render our democracy representative is compelling.

The *Hays* Court abdicated its responsibility to ground its legal analysis in the racial realities of the Nation today. This Court should reject the conclusions of the court below, which are in conflict with the realities of racial bloc voting and African-American exclusion from the political process, as well as the rules laid down in *Shaw*.

From 1877 to 1991, no African American from Louisiana served in the United States Congress. Louisiana's post-1990 reapportionment represents the state's good-faith effort to remedy its tragic history of racial exclusion. Now, for the first time in the state's history, Louisiana has a truly integrated congressional delegation that fairly reflects the state's racial diversity. Two

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[36] L. Hughes, "I Dream a World," in *American Negro Poetry* 71-72 (A. Bontemps ed., 1963).

African Americans now serve; each represents a racially integrated district.

This Court should not sanction efforts to turn the clock back to the days of a lily-white legislature governing a diverse nation. This Court should emphatically reject the theory that a 55% African-American constituency—like the challenged Louisiana Fourth District—is segregated while an 80% white district—like the one dictated by the court below—is not. Thus, this Court should reverse the judgment of the district court and hold that states have the power to ensure the equal opportunity of African-American citizens to participate in all levels of a pluralist political process.

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Respectfully submitted,

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APPENDIX A

APPENDIX A:

AFRICAN-AMERICANS IN THE U.S. CONGRESS, 1870-1995

Member	Party-State	Years
Hiram R. Revels	R-MS	1870-71
Blanche K. Bruce	R-MS	1875-81
Edward W. Brooke	R-MA	1967-79
Carol Moseley-Braun	D-IL	1993-

United States House of Representatives

Joseph H. Rainey	R-SC	1870-79
Jefferson F. Long	R-GA	1870-71
Robert B. Elliot	R-SC	1871-74
Robert C. De Large	R-SC	1871-73
Benjamin S. Turner	R-AL	1871-73
Josiah T. Walls	R-FL	1871-73
Richard H. Cain	R-SC	1873-75 1877-79
John R. Lynch	R-MS	1873-77 1882-83
James T. Rapier	R-AL	1873-75
Alonzo J. Ransier	R-SC	1873-75
Jeremiah Haralson	R-AL	1875-77
John A. Hyman	R-NC	1875-77
Charles E. Nash	R-LA	1875-77
Robert Smalls	R-SC	1975-79
James E. O'Hara	R-NC	1883-87
Henry P. Cheatham	R-NC	1889-93
John M. Langston	R-VA	1890-91

Member	Party-State	Years
Thomas E. Miller	R-SC	1890-91
George W. Murray	R-SC	1893-95 1896-97
George W. White	R-NC	1897-1901
Oscar DePriest	R-IL	1929-35
Arthur W. Mitchell	D-IL	1935-43
William L. Dawson	D-IL	1943-70
Adam C. Powell, Jr.	D-NY	1945-67 1969-71
Charles C. Diggs, Jr.	D-MI	1955-80
Robert N.C. Nix	D-PA	1958-78
Augustus F. Hawkins	D-CA	1963-90
John Conyers, Jr.	D-MI	1965-
William L. Clay	D-MO	1969-
Louis Stokes	D-OH	1969-
Shirley A. Chisholm	D-NY	1969-82
George W. Collins	D-IL	1970-72
Ronald V. Dellums	D-CA	1971-
Ralph H. Metcalfe	D-IL	1971-78
Parren H. Mitchell	D-MD	1971-86
Charles B. Rangel	D-NY	1971-
Walter E. Fauntroy	D-D.C.	1971-90
Yvonne B. Burke	D-CA	1973-79
Cardiss Collins	D-IL	1973-
Barbara C. Jordan	D-TX	1973-78
Andrew J. Young	D-GA	1973-77
Harold E. Ford	D-TN	1975-
Bennett M. Steward	D-IL	1979-80
Julian C. Dixon	D-CA	1979-
William H. Gray	D-PA	1979-91
Mickey Leland	D-TX	1979-89
Melvin Evans	R-V.I.	1979-80
George W. Crockett, Jr.	D-MI	1980-90
Mervyn M. Dymally	D-CA	1981-92

Member	Party-State	Years
Gus Savage	D-IL	1981-92
Harold Washington	D-IL	1981-83
Katie B. Hall	D-IN	1982-84
Major R. Owens	D-NY	1983-
Edolphus Towns	D-NY	1983-
Alan Wheat	D-MO	1983-94
Charles A. Hayes	D-IL	1983-92
Alton R. Waldon, Jr.	D-NY	1986-87
Mike Espy	D-MS	1987-93
Floyd H. Flake	D-NY	1987-
John Lewis	D-GA	1987-
Kweisi Mfume	D-MD	1987-
Donald M. Payne	D-NJ	1989-
Craig A. Washington	D-TX	1989-84
Barbara R. Collins	D-MI	1991-
Gary A. Franks	R-CT	1991-
William J. Jefferson	D-LA	1991-
Eleanor H. Norton	D-D.C.	1991-
Maxine Waters	D-CA	1991-
Lucien E. Blackwell	D-PA	1991-94
Sanford Bishop	D-GA	1993-
Corrine Brown	D-FL	1993-
Eva M. Clayton	D-NC	1993-
James E. Clyburn	D-SC	1993-
Cleo Fields	D-LA	1993-
Alcee L. Hastings	D-FL	1993-
Earl F. Hillard	D-AL	1993-
Eddie B. Johnson	D-TX	1993-
Cynthia McKinney	D-GA	1993-
Carrie Meek	D-FL	1993-
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Member	Party-State	Years
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In the

Supreme Court of the United States

October Term, 1994

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UNITED STATES,
Appellant,
v.
RAY HAYS, et al.,
Appellees,

◆

STATE OF LOUISIANA, et al.,
Appellants,
v.
RAY HAYS, et al.,
Appellees.

◆

On Appeal from a Three-Judge Panel
of the United States District Court
for the Western District of Louisiana

◆

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES, RAY HAYS, et al.

◆

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES, RAY HAYS, et al.

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IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellees, Ray Hays, *et al.* All parties have consented to the filing of this amicus brief. The letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases before this Court including *Adarand v. Pena*, Sup. Ct. Docket No. 93-1841, *Chisom v. Roemer*, 501 U.S. 380 (1991), *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. 419 (1991), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

PLF believes that this Court's opinions regarding racial classifications, both in the voting rights context and otherwise, require strict scrutiny. This includes congressional districts gerrymandered on the basis of race. The historical vision of equal rights--focusing on the rights of individuals rather than groups--must be placed at the forefront of analysis. The more recent permutation of "equality" based on numbers illegitimately subverts the moral equality on which our republic is based and imposes a crude form of proportional representation. American's melting pot cannot easily withstand the onslaught of hyphenated Americans claiming rights based solely on racial characteristics.

For the reasons stated herein, the decision of the Western District of Louisiana should be affirmed.

STATEMENT OF THE CASE

Louisiana's Fourth Congressional District is bizarre. The district cuts across historical and cultural divides, splits 12 of its 15 parishes, and divides 4 of the 7 major cities of the state. It is 250 miles long. It ignores all traditional North-South, ethno-religious, economic, and historical distinctions in the state. *Hays v. Louisiana*, 862 F. Supp. 119, 126 (W.D. La. 1994) (Shaw, J., concurring).

What is the cause of this strange district, which lacks both compactness and commonality of interests? Racial gerrymandering. About 55% of the district's voting age population is black. *Id.* at 122. Louisiana currently has seven seats in the United States House of Representatives, down one from the eight seats it had until the 1990 census. Of those seven seats, one has long been designated a "majority-minority" seat--that is, the black minority constitutes a majority of the voting-age population. *Hays v. Louisiana*, 839 F. Supp. 1188, 1191 (W.D. La. 1993).[1] This district (District 2), covering the New Orleans area, is unchallenged. *Id.* Louisiana created District 4, however, in response to pressure from the United States Department of

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[1] The more recent *Hays* case adopted by reference the earlier decision striking down the first incarnation of Louisiana Congressional District 4. *Hays*, 862 F. Supp. at 121.

Justice. *Hays*, 862 F. Supp. at 122. Actually, District 4 has been twice drawn and twice challenged.

The first legislative rendering created a Z-shaped district that ran from the northwest part of the state near Shreveport diagonally along the Red River to Alexandria and then farther southeast along the Mississippi River past Baton Rouge. *Hays*, 839 F. Supp. at 1199. About 63% of the district's voting age residents were black. *Id.* at 1191. When a three-judge District Court struck down this racial gerrymander after applying strict scrutiny, *id.* at 1218, the state legislature tried again. They came up with the district described above.

Again the three-judge District Court below struck down the gerrymander. *Hays v. Louisiana*, 862 F. Supp. at 119. The court found the second attempt to be merely a "cosmetic makeover" of the initial gerrymander. *Id.* at 122 n.1. All persons involved directly with the formation of the district acknowledged that the creation of a second majority-minority district was the specific intent of the Legislature. *Id.* at 122. Such creation was wholly unnecessary under the Voting Rights Act.[2] Section 5 of the Voting Rights Act creates an affirmative duty to avoid retrogression or enactment of a plan that has the purpose or effect of denying or abridging the right to vote because of race or color. 42 U.S.C. § 1973a(c) (1988). Because one out of seven seats is an automatic *progression* from one out of eight seats, the court below found Section 5 inapplicable. *Hays*, 862 F. Supp. at 123. The fact that the Department of Justice threatened to withhold preclearance if a second district was not created, while a real concern, was not a compelling one.

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[2] Pub. L. No. 89-110, 79 Stat. 445, codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988).

Id. at 123 n.3. Section 2 of the Voting Rights Act is violated if a state's apportionment scheme effectively diminishes or abridges the voting strength of a protected class. *Id.* at 123. However, the court below relied on this Court's decision which held that "dilution" claims must be conditioned on the existence of a numerous and compact minority that is politically cohesive and subject to majority bloc voting usually defeating the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Hays*, 862 F. Supp. at 123-24. The court below, simply by looking at the composition of District 4, found that the state could not even find a "compact minority" and, thus, Section 2 did not apply. *Hays*, 862 F. Supp. at 124. The court further found that, even if a compelling interest on the part of the state existed (which it did not), the district was not narrowly tailored in any respect. Thus, the racial gerrymander violated the Equal Protection Clause. *Id.* at 124-25.

Finally, the court found that individual voting rights suffer constitutional injuries when subjected to racially motivated gerrymanders. *Id.* at 125. The court concluded:

> The validity of equal protection and the systemic legitimacy of our electoral process are threatened when a State sculpts voting districts along race lines. As here, when the State cannot, or has not, offered and supported an extraordinary justification for these questionable measures, the race-conscious enactments must fall.

Id. at 125.

The Justice Department and the State of Louisiana both appealed the District Court's decision, while Ray Hays, *et al.*, moved to affirm the judgment. This Court consolidated the appeals and noted probable jurisdiction on December 12, 1994.

SUMMARY OF ARGUMENT

Racial classifications, inherently problematic, also violate the Fourteenth Amendment of the United States Constitution unless they are narrowly tailored to further a compelling governmental interest. Racial classifications tied to suffrage are not excepted from this standard. The combination of a classification affecting a suspect class as well as a fundamental right leaves no alternative. The court below correctly subjected the statutory creation of Louisiana Congressional District 4 boundary lines to strict scrutiny.

Historically, American political thought emphasized equality of opportunity, "moral equality," over equality of results, "numerical equality." From the Founding and the Civil War through the enactment of the landmark civil rights legislation in the 1960s, both government and citizen activists agreed that moral equality was the basis for a strong, nondiscriminatory republic. For the past 25 years, however, numerical equality superseded moral equality as the foundation for governmental decision making. This ascendance of numerical equality is contrary to the premises on which America achieved its distinctive greatness.

Moreover, as a matter of policy, both the state and federal governments should attend to voting rights with an eye toward encouraging the greatest possible exercise of the franchise while minimizing the deeply divisive racial classifications which inhere in majority-minority districts. Racial gerrymandering creates numerous injuries, both to those within and without the district lines, both representatives and constituents. It creates a rift between representatives and those constituents who do not share either the physical or ethnic characteristic which assured the representatives' election or the political views of the representative assured election. It stigmatizes those who are elected with the government's rigged rules, as though such election could never otherwise be achieved. And perhaps most importantly, it repudiates the individuality of all people within the district, viewing them primarily, if not entirely, as mere members of a presumably homogenous group.

For the reasons stated below, the Western District of Louisiana's decision invalidating the racially gerrymandered Congressional District 4 should be affirmed.

ARGUMENT

I

RACIAL CLASSIFICATIONS WHICH IMPACT SUFFRAGE MUST BE SUBJECT TO STRICT SCRUTINY

The State of Louisiana and the United States Department of Justice inexplicably insist there is a real issue as to whether the court below correctly analyzed this case by using strict scrutiny. United States Department of Justice, Jurisdictional Statement at 10-12; Louisiana Department of Justice, Jurisdictional Statement at 10-15. This Court has long held that racial classifications must be analyzed under strict scrutiny. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). This is so not only for classifications appearing on the face of legislation but also for those classifications which have a discriminatory effect. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886). This highest level of scrutiny is justified because racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

Moreover, this Court held in *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), that the right to vote is a fundamental right which must also withstand strict scrutiny. *See also Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969). *Shaw v. Reno*, 509 U.S. ___, 125 L. Ed. 2d 511 (1993), addressed a North Carolina gerrymander which, like this case, also contained issues relating to both racial classifications and suffrage. In *Shaw*, this Court analyzed the racial gerrymander under strict scrutiny. *Id.* at 526. The combined effect of a racial classification impacting the fundamental right to vote cannot logically be reduced to analysis less than its component parts. *Shaw* viewed its application of strict scrutiny as an unremarkable consequence of many other cases which did precisely the same thing. After all, in the voting context or otherwise, the central purpose of the Fourteenth Amendment is to prevent the state from purposefully discriminating on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Shaw*, 125 L. Ed. 2d at 525.

The *Shaw* Court explained that reapportionment legislation which cannot be understood as anything other than an effort to classify and separate voters by race injures voters in two distinct ways: (1) it reinforces racial stereotyping, and (2) it undermines our country's system of representative democracy. *Shaw*, 125 L. Ed. 2d at 526. The majority ruled that state legislation which expressly distinguishes among citizens on account of race--whether it contains an explicit distinction or is unexplainable on grounds other than race--must be narrowly tailored to further a compelling state interest. *Id.* The Court compared its decision to several earlier cases, including *Richmond v. J.A. Croson Co.*, 488 U.S. at 493 (stating that express racial classifications are immediately suspect because "[a]bsent searching judicial inquiry ... there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics"); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-78 (1986) (plurality opinion) (stating that the Fourteenth Amendment requires that "state legislation which expressly distinguishes among citizens based on their race be narrowly tailored to further a compelling governmental interest"); and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) ("[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification"). Moreover, "[t]hese principles apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race-neutral, are, on their face, 'unexplainable on grounds other than race.'" *Shaw*, 125 L. Ed. 2d at 526, (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)). These statutes "demand[] the same close scrutiny that we give other state laws that classify citizens by race." *Shaw*, 125 L. Ed. 2d at 527 (citation omitted).

Although the *Shaw* Court attempted to reconcile its decision with *United Jewish Organizations of Williamsburgh, Inc. v. Carey (UJO)*, 430 U.S. 144, 161 (1977), which held that "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment," such reconciliation was misleading and unnecessary because *UJO* predates the *Croson* and *Wygant* decisions subjecting remedial race-conscious legislation to strict scrutiny. *See* Sperling, *Note, Equal Protection and Race-Conscious Reapportionment: Shaw v. Reno, 113 S.Ct. 2816 (1993)*, 17 HAR. J. OF L. AND PUB. POL'Y 283, 288-89 (1994). The court below thus noted the *Shaw* court's reliance on "more recent equal protection precedents, focusing on individual rights as opposed to *UJO's* group-based approach." *Hays*, 862 F. Supp. at 123.

Shaw specifically refutes the argument of appellants in this case, that strict scrutiny is "unworkable" because of the variety of factors considered when drawing all districts. *See* Louisiana Department of Justice, Jurisdictional Statement at 13-14. "The difficulty of proof ... does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race." *Shaw*, 125 L. Ed. 2d at 528. *Shaw* noted that some cases would not be difficult, such as the "uncouth" district in *Gomillion* (364 U.S. at 341) or a case in which a state "concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Id.* at 528. This is precisely the case currently before the Court. The court below found District 4 to be a classic racial gerrymander and dismissed the state's proffered explanations as post hoc rationalizations. *Hays*, 862 F. Supp. at 122.

Louisiana argues that its racial gerrymander should be valid because it was based on a former political gerrymander (Louisiana Jurisdictional Statement at 16-18). The court below, however, found that the new district was undeniably drawn to assure a certain percentage of black voters within the district. *Hays*, 862 F. Supp. at 122. The former District 8, drawn to ensure the reelection of Gillis Long, was also bizarrely shaped but never challenged because it was a political, rather than racial, gerrymander. *Id.* *Shaw* found a significant distinction between the two types of redistricting.

Strict scrutiny is appropriate for racial gerrymanders even when not necessarily so for political gerrymandering because of

> our country's long and persistent history of racial discrimination in voting--as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race.

Shaw, 125 L. Ed. 2d at 531. The lines of the "Old Eighth" are only roughly approximate to the new District 4. *Hays*, 862 F. Supp. at 122 n.2; United States Jurisdictional Statement at 111a-114a (maps of District 8 from 1967-1992). The peculiar extensions from the general area of the "Old Eighth" both to the North and South while excluding territory in the East, can be explained only by the state's determination to pack a certain percentage of citizens into a single district. *Hays*, 862 F. Supp. at 122-23. Even on its merits, Louisiana's post hoc rationalization for the gerrymander must fail.

The need for strict scrutiny is evident. Courts must inquire into the justification for race-based measures so as to determine which "classifications are in fact motivated by illegitimate notions of racial inferiority or ... *racial politics*." *Croson*, 488 U.S. at 493 (emphasis added). Of course, gerrymanders are inherently political and the racial aspect of the particular gerrymander under review cannot be denied. Strict scrutiny by the court below brought forth the fact that Louisiana fully complied with the Voting Rights Act with a single minority-majority district encompassing New Orleans. *Hays*, 862 F. Supp. at 123-24. "Without concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies, we cannot agree that the re-segregation of

Louisiana by racially configured voting districts is warranted." *Id.* at 124. The court below correctly held that any further attempts to "tinker with district lines in order to ensure minority control at the polls" violates the Fourteenth Amendment. *Id.*

II

STATE-SPONSORED RACIAL SEPARATISM ENCOURAGES CONFLICT AMONG THE RACES AND MAKES FAULTY AND PROBLEMATIC ASSUMPTIONS ABOUT THE ROLES OF MINORITY REPRESENTATIVES AND CONSTITUENTS

Moral equality requires that government and society consider every person as an individual, not as a fungible member of some racial or ethnic group. Moral equality forbids government from handicapping individuals for arbitrary or discriminatory reasons. It has been alternatively described as "equality of opportunity," especially when contrasted with numerical equality, or "equality of results." T. Eastland and W. Bennett, *Counting By Race: Equality from the Founding Fathers to Bakke and Weber*, 9-10 (Basic Books, Inc., N.Y., 1979) (Counting by Race); *see also* T. Sowell, *A Conflict of Visions: Ideological Origins of Political Struggles*, 121-40 (William Morrow & Co., N.Y., 1987). America was founded on the basis of moral equality as it is so eloquently phrased in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." The institution of slavery existed at the time of the Declaration and was hopelessly inconsistent with it. For nearly a century, the incompatibility provoked tremendous political debate which was finally resolved when Abraham Lincoln declared an end to slavery in 1863 and subsequently won the Civil War. The Fourteenth Amendment enshrined the victorious concept of moral equality after the Civil War and this concept was still the norm through the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Only within the last 25 years has devotion to numerical equality threatened to subsume moral equality as the basis for the American republic.

A. Historical Basis for Moral Equality

The notion of moral equality is the thread winding through the tapestry of philosophical thought which most influenced the Founding of the American republic. In John Locke's Second Treatise, the philosopher considered "what state all men are naturally in." J. Locke, *Two Treatises of Government* 121 (T. Cook ed. 1947), *cited in* H. Jaffa, *How to Think About the American Revolution: A Bicentennial Celebration* (Carolina Academic Press Durham, N.C., 1978) (How to Think) at 40. It is, he said, "a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man." *Id.* It was this concept of natural freedom and equality that provided the principle that the just powers of government in the American political tradition are derived from the consent of the governed. Because the right of consent is itself derived from the equality of all humans, consent is limited--one may not consent to that which denies the premise of equality. How to Think at 40-42. The concept of equality is reiterated in James Madison's *Federalist No. 51*. There, Madison wrote, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." *Federalist No. 51*, (Rossiter ed. 1961) at 322. A government of men over men, rather than of angels over men, or of men over beasts, presumes the moral equality of the men who govern, not only among themselves but also with the governed. Thus, the very nature of the problem that the Constitution was written to resolve is determined by the meaning of equality. How to Think at 42.

British political scientist Joel Barlow wrote in 1792 that the American notion of moral equality created the Revolution and sustained American freedom. He noted that, in America, the word "people" meant the whole community and comprehended every human being in the society. There were only "individuals" in America; there could be nothing else--no orders, no lords, no monarchs. Rather, Americans revered only those distinctions which nature created--a diversity of talents, abilities, and virtues:

> They all feel that nature has made them equal in respect to their rights; or rather that nature has given to them a common and an equal right to liberty, to property, and to safety; to justice, government, laws, religion, and freedom. They all see that nature has made them very unequal in respect to their original powers, capacities, and talents. They become united in claiming and in preserving the equality, which nature has assigned to them; and in availing themselves of the benefits, which are designed, and may be derived from the inequality, which nature has also established.

J. Barlow, *Advice to the Privileged Orders in the Several States of Europe Resulting from the Necessity and Propriety* *of a General Revolution in the Principles of Government* 17 (Ithaca, N.Y., 1956, first published London, 1792), *cited in* G. Wood, *Creation of the American Republic, 1776-1789* 607 (University of North Carolina Press 1969). The obvious conflict between the earlier notions of moral equality and the institution of slavery was not fully resolved in American political and legal thought until Abraham Lincoln freed all the slaves with the Emancipation Proclamation on January 1, 1863, *reprinted in* H. Commager, *Documents of American History* Vol. 1 420-21 (9th ed. 1973) (Documents), and the states ratified the Thirteenth Amendment to the United States Constitution on December 6, 1865.

Lincoln's importance to the development of the concept of moral equality cannot be underestimated. His main insight was that the principle of equality was logically necessary to the idea of self-government. *Lincoln's First Inaugural Address* (March 4, 1861), *reprinted in* Documents at 386-88. Self-government, by definition, requires the assumption that all humans possess free will and that all are morally autonomous, capable of choosing right and wrong. In this sense, all individuals are created equal and, thus, for one person to deal with another, because of race, in ways that deny or diminish the other's intrinsic worth as a moral agent is to deny the very basis upon which self-government is possible. Counting By Race at 55-56.

In his message to Congress of July 4, 1861, Lincoln defined the cause of the Union. It was, he said, to maintain in the world "that form, and substance of government, whose leading object is, to elevate men--to lift artificial weights from all shoulders--to clear the paths of laudable pursuit for all--to afford all, an unfettered start, and a fair chance, in the race of life." 4 *The Collected Works of Abraham Lincoln* 438 (R. Basler ed. 1953), *cited in* How to Think at 34. Thus, republican government, in Lincoln's view, necessitated the elimination of slavery because it required recognition of the principle of moral equality. Lincoln believed this principle was higher than that of popular sovereignty; indeed, he believed that the principle of equality was higher than any other: It defined republican government. Counting By Race at 47.

The passage of the Civil War Amendments in 1865-1870 highlighted the primacy of moral equality. The moral equality espoused by President Lincoln led to the judicial concept of a color-blind Constitution:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In 1962, Judge John Minor Wisdom argued that a Louisiana law requiring racial identification on ballot applications should be overturned: "The vice in the law is the State's placing its power and prestige behind a policy of racial classification inconsistent with the elective processes. ... If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." *Anderson v. Martin*, 206 F. Supp. 700, 705 (D. La. 1962) (Wisdom, J., dissenting) *rev'd*, 375 U.S. 399 (1964).

The following year, in *Wright v. Rockefeller*, 376 U.S. 52 (1964), this Court confronted the black establishment, represented by Adam Clayton Powell, who intervened in the case to argue in favor of a racial gerrymander.[3] Justice Douglas, in dissent, exposed the self-interested reasons and self-destructive effects of such an argument. Justice Douglas noted that the intervenors and the state did not appear to support segregation under *Plessy v. Ferguson*'s "'separate but equal'" theory, but rather under a theory which might be called "'separate but better off.'" *Wright*, 376 U.S. at 62 (Douglas, J., dissenting). This theory had surfaced before in *Buchanon v. Warley*, 245 U.S. 60, 81 (1917), to support municipal segregation of residential areas; in *District of Columbia v. Thompson*, 346 U.S. 100, 115-16 (1953), to support segregation in restaurants; and in *Watson v. Memphis*, 373 U.S. 526, 535-36 (1963), to support delayed integration of municipal parks. Justice Douglas found the fact that political leaders discovered an advantage in a racial gerrymander to be irrelevant to the constitutional issues. "Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards." *Wright*, 376 U.S. at 62 (Douglas, J., dissenting). The court below similarly derided "incumbency politics" as a purported justification for a racial gerrymander. *Hays*, 862 F. Supp. at 123.

Harkening back to the evolution of moral equality under Lincoln, Justice Douglas found racial voting practices abhorrent. Douglas correctly emphasized that our country is created of the people, by the people, for the people.[4] "[T]he individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. *Cf. Gray v. Sanders*, 372 U.S. 268, 379 [(1963)]." *Wright*, 376 U.S. at 66. (Douglas, J., dissenting). History has surely demonstrated the truth in Justice Douglas' position when he forecast that racial gerrymandering and proportional representation divides communities by emphasizing differences between candidates that are irrelevant in the constitutional sense. While individual voters may take into account any factors they choose when it comes time to vote, government has no business designing electoral districts along racial lines. *Id.*

---

[3] Current incumbent Congressman from Louisiana District 4, Cleo Fields, testified at the trial. *See, e.g.*, *Hays*, 839 F. Supp. at 1208.

Only two years after *Wright*, Congress enacted the Voting Rights Act. Section 5 of the Act was intended to safeguard Section 4's prohibition of literacy tests and other prerequisites for *voting*. The whole concern of the act was to ensure nondiscriminatory access to the ballot. *See Allen v. State Board of Elections*, 393 U.S. 544, 582-94 (1969) (Harlan J., dissenting). Whether or not the casting of the ballot would prove "effective"--in the sense of the political consequences--appeared nowhere in the statute or its legislative history. On the contrary, the Act's assurance of access to the ballot was intended to enable minorities to assert political power on the same terms as everyone else. The act nowhere suggests that the full and "undiluted" exercise of the franchise required a district in which blacks formed a majority. A. Kull, *A Color Blind Constitution*, 213 (Harvard University Press Cambridge, 1992). The decision of the court below is fully consistent with the American tradition of moral equality and should be affirmed.

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[4] This is a reference to the Gettysburg Address, in which Lincoln said, "[i]t is rather for us to be here dedicated to the great task remaining before us ... that this nation, under God, shall have a new birth of freedom--and that government of the people, by the people, for the people, shall not perish from the earth." A. Lincoln, *The Gettysburg Address* (Nov. 19, 1863), *reprinted in* Commager, Documents, at 428-29.

B. Practical Consequences of Voting by Race

The battle for true civil rights based on moral equality was fought and won many years ago. Like any fundamental human achievement, these rights cannot be taken for granted and must be safeguarded. However, some permutations of civil rights have become divorced from the moorings of moral equality:

> [C]ivil rights are not protected or enhanced by the growing practice of calling every issue raised by "spokesmen" for minority, female, elderly, or other groups, "civil rights" issues. The right to vote is a civil right. The right to win is not. Equal treatment does not mean equal results. Everything desirable is not a civil right.

T. Sowell, *Civil Rights: Rhetoric or Reality?*, 109 (William Morrow & Co., N.Y., 1984) (Rhetoric or Reality).

The harms from pursuing the course advocated by the United States and Louisiana Departments of Justice fall into three categories: (1) the rift between representatives and some constituents; (2) stigmatizing representatives who are elected with government assistance; and (3) immoral assumptions that deny a person's individuality in favor of mere group membership.

1. Who Do Gerrymandered Candidates Represent?

As a practical political matter, segregating political districts by race only deepens racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions. Black candidates are easily elected in safe black districts while white candidates are elected in safe white districts. Neither whites nor blacks have any incentive to seek support from the other's constituency. *Holder v. Hall*, 512 U.S. ___, 129 L. Ed. 2d 687, 711-12 (1994) (Thomas, J., concurring).

> We are bent upon polarizing political subdivisions by race. The arrangement we construct makes it unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens.

United States v. Dallas County Commission, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring specially).

As this Court recognized in *Shaw*, 125 L. Ed. 2d at 529, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." Thirty years ago, Justice Douglas also bluntly made this point:

> When racial ... lines are drawn by the State, the multiracial ... communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race ... rather than to political issues are generated; communities seek not the best representative but the best racial ... partisan. Since that system is at war with the democratic ideal, it should find no footing here.
>
> "Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.

Wright, 376 U.S. at 67 (Douglas, J., dissenting).

A state-imposed racial gerrymander also assumes that, given a choice, black voters would not exercise broader influence over a number of competitive districts. One of the obvious (if indirect and unintended) effects of creating and maintaining safe black seats is to isolate the black community, as well as to diminish electoral competition. Where black voters are confined to a single constituency, they might well be certain of electing *one* black candidate, but the elected representative might also be the only one--or a member of a small, heavily outnumbered and consequently ineffective band. Meanwhile, the black electorate suffers a diminished capacity to influence white representatives who might have taken their concerns into account if they themselves had needed to rely on black votes. J. R. Pole, *The Pursuit of Equality in American History*, 449-50 (2d ed. revised, University of California Press, Berkeley, 1993) (Pursuit of Equality); D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice*, 96 (Basic Books, Inc. N.Y., 1987) (proportional representation would "worsen racial tensions because it distorts the political process in order to create targeted entities less likely to engage in the coalition building that is the hallmark of American politics").

Given the polarizing nature of a racial gerrymander, one might inquire just what is the minority representative supposed to contribute? It is inappropriate to treat people simply as bearers of some imagined racial or ethnic perspective--to treat them, in other words, as categories. True diversity is not achieved by looking to "personal qualities crude enough to be obvious to sense perception." Counting By Race at 152, (citing Martin, "*The Parable of the Talents*," 256 *Harper's* 18, 21 (January, 1978)).

2. The Costs of Stigmatic Harm

The nature of stigmatic harm from preferential policies is well-documented in contexts ranging from contracting preferences, to school admissions, to voting rights. This Court has often acknowledged this danger of stigmatic harm. In *Croson*, 488 U.S. at 493, this Court held that contracting preferences must be strictly reserved for remedial settings or they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. In *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978), the Court noted that preferential student admissions programs reinforce common stereotypes that certain groups cannot achieve success without special protection based on a factor having no relation to individual worth. Finally, as Justice Thomas recently stated in the context of voting rights, "few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act." *Holder*, 129 L. Ed. 2d at 711 (Thomas, J., concurring).

Racial gerrymanders prescribe disharmony among the races. It draws attention to racial differences and, though not intending to do so, exacerbates them in some minds. The failures of the Great Society amply demonstrate that drawing attention to race cannot draw us closer to the realization of a colorblind society. Racial gerrymandering simply is not necessary for achieving moral equality in the voting rights context. The Voting Rights Act provides individual minorities, who may choose to form coalitions on any basis they choose, a real chance and a real opportunity to participate in the electoral process. Racial gerrymandering distorts the abilities of minority candidates and political organizations and also denigrates the real and substantial achievements they have recorded during the past decade, as well as their expected real and substantial achievements in the future. *See* Counting by Race at 157. *Cf.* Rhetoric or Reality at 49-50 (demonstrating historical trend of increasing black representation in professional, technical, and other high-level occupations both prior and subsequent to the Civil Rights Act of 1964).

Lastly, in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), a case involving the reapportionment of the Indiana legislature using multimember districts, this Court noted the limitations of using race as the primary factor in deciding electoral questions. In that case, it was not the blacks in their capacity as blacks but the Democrats as a political party who had lost the election under scrutiny; there were ways of losing elections other than being black. *Id.* at 153. Repudiating the claim that minorities should be entitled to proportional representation as a matter of fairness, the Court insisted that the plaintiffs must show that their lack of legislative representation was attributable to a built-in bias rather than to voting for the wrong party and losing at the polls. *Id.* at 154. The Court thus implied that candidates are entitled to win or lose an election on their merits and defects, or those of their party. *Id.* at 154-55. One may not assume that when white candidates lose elections it is on account of the political issues, but when minority candidates lose elections it is always on account of race. *See* Pursuit of Equality at 448-49.

3. Erroneous Assumptions Attributing Certain Individual Characteristics to a Group

The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). The court below specifically recognized that an individual injury occurs "[w]hen voting districts are carefully planned like racial wards." *Hays*, 862 F. Supp. at 125.

Shaw explicitly denounced the assumptions which underlie racial gerrymandering:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group--regardless of their age, education, economic status, or the community in which they live--think alike,

> share the same political interests, and will prefer the same candidates at the polls. ... By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

Shaw, 125 L. Ed. 2d at 529. *Shaw* noted that it was certainly not the first Supreme Court opinion to reject such perceptions as impermissible racial stereotypes. *Id.* at 529, (citing *Holland v. Illinois*, 493 U.S. 474, 484 n.2 (1990)) (prosecutor's assumption that a black juror may be presumed to be partial simply because he is black violates the Equal Protection Clause) and *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) (automatic invocation of race stereotypes retards progress as a multiracial democracy and causes continued hurt and injury). So, too, the court below held that "[a]ll citizens are stigmatized by the notion that their 'interests' can be defined by race or will be represented adequately only if a member of their racial 'group' holds a particular office." *Hays*, 862 F. Supp. at 125.

In *Holder v. Hall*, Justice Thomas further surveyed the damage done. He found the most pernicious aspect of the Court's foray into political theory to be the willingness to accept the one underlying premise that must inform every minority vote dilution claim: the assumption that the group asserting dilution shares not only racial or ethnic characteristics, but also distinct political interests. By forcing minorities who do not share geographic or local interests in a single congressional district for the sole purpose of assuring minority representation, the Court must assume that members of racial and ethnic groups all think alike on important matters of public policy and must have correspondingly racial or ethnic representatives in elected bodies if they are to be considered represented at all. *Holder*, 129 L. Ed. 2d at 711 (Thomas, J., concurring). The court below also recognized the dangerous stereotypes inherent in the appellants' arguments. The court refused "to accept the explanation that citizen response to issues such as education, crime and health care is driven by skin pigmentation. Legitimation of that notion would herald the demise of equal protection." *Hays*, 862 F. Supp. at 124.

The pursuit of numerical, rather than moral, equality unfortunately has been embraced by virtually all institutions of government and some public opinion. The most disturbing aspect of this shift in political thought is the disavowal of individual rights in favor of a collective group rights concept of equality. All blacks are held to be victims of discrimination and hence entitled to compensation. All whites are held to have benefited unjustly from the system of racial discrimination and are guilty. These assumptions stand in fundamental opposition to the universal principle of individual rights that has been the moral and intellectual foundation of the American republic. *See* H. Belz, *Equal Protection and Affirmative Action, The Bill of Rights in Modern America* 173 (Bodenhamer & Ely, eds., Indiana University Press, 1993).

These assumptions are faulty, not only because they refuse to treat individuals as valid outside the context of their group membership, but also because ethnic identity is inherently unstable. It tends to change shape and character over time. Many individual members of racial or ethnic communities, in the course of their daily lives, mix freely with others in the workplace, in schools and colleges, in recreation and entertainment facilities, neighborhoods, and (sometimes consequently) weddings. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429 (1984) (parent may not lose custody due to remarriage to person of another race); *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation statute held unconstitutional). These instabilities follow inevitably from a volatile human nature in a relatively free society. But the United States and Louisiana Departments of Justice are not daunted by these tendencies. The United States is not a republic of nations; but appellants appear willing to contemplate with equanimity the prospect of a republic of political ethnicities. *See* Pursuit of Equality at 451-52. One need only pick up the international page of a newspaper to be reminded of the atrocities that can occur in such a polarized climate. The United States is a republic of equal citizens, not a republic of ethnic or religious groups. The Constitution speaks only of individuals; therefore, our elected officials must represent individuals. A racial gerrymander which elevates racial characteristics above any of the individuals in the district must be struck down.

CONCLUSION

Repeated so often, the words of Justice Harlan in dissent from *Plessy v. Ferguson* have taken on the tone of a mantra. And yet, the meaning and import of those words has increased as the American struggle with race relations has continued in the century since that case was decided.

> The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. ...
>
> The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before

> the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race ... under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned.

Plessy v. Ferguson, 163 U.S. at 560-61 (Harlan, J., dissenting). Once more, we note the truth of Justice Harlan's dissent and urge this Court to uphold the legacy of truth by affirming the decision of the court below.

DATED: February, 1995.

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Nos. 94-558 and 94-627

In The

Supreme Court of the United States

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Supreme Court, U.S.
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◆

UNITED STATES,

Appellant,

v.

RAY HAYS, *et al.*,

Appellees.

◆

STATE OF LOUISIANA, *et al.*,

Appellants,

v.

RAY HAYS, *et al.*,

Appellees.

◆

On Appeal From A Three-Judge Panel
Of The United States District Court
For The Western District Of Louisiana

◆

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLEES

◆

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest legal center committed to defending and strengthening the essential foundations of a free society: private property rights, individual liberty, and the free exchange of ideas. The instant case involves the power of the state to make decisions on the basis of racial classifications.

Although the question in the case before this Court concerns the constitutional legitimacy of race-based congressional districting, the issues presented involve both the legal standards contained in the Voting Rights Act and fundamental questions about American society, its openness to racial change, and the nature of democratic representation.

This brief was prepared with the assistance of Professor Abigail Thernstrom, one of the nation's foremost experts on the history and jurisprudence of the Voting Rights Act.

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

CONDENSED STATEMENT OF FACTS

The complete statement of facts and the history of this litigation has already been presented by both parties. This brief summary is designed to highlight those facts we believe are critical to the proper understanding and disposition of the case. A congressional districting plan adopted by the state of Louisiana following the 1990 census contained seven districts, two of which were majority-black. One of those two (District 2) was unremarkable; it differed little from that which it replaced. The contours of District 4, however, were new. The district was drawn with the explicit purpose of creating a second safe black constituency, and was thus subsequently successfully challenged as an unconstitutional racial gerrymander – an impermissible racial classification. *Hays v. Louisiana,* 839 F. Supp. 1188 (W.D. La. 1993), *vacated and remanded on other grounds,* 114 S.Ct. 2731 (1994) (U.S. Jurisdictional Statement ("J.S.") App. 39a).

Louisiana redrew the lines, but the new district, which split parishes and cities, was again extremely irregular in shape, and direct trial evidence suggested that its contours were again determined by racial considerations. The plan was defended by Louisiana as reasonable, resting on traditional districting criteria, race-conscious but not race-driven. On the other hand, the state asserted, even if viewed as a racial classification, subject to strict scrutiny, it could meet the test; it was narrowly tailored to remedy past discrimination and to further a compelling state interest in complying with the Voting Rights Act. These are the main arguments, rejected by the court below, see *Hays v. State of Louisiana,* 862 F. Supp. 119 (W.D. La. 1994) (U.S. J.S. App. 1a), that Lousiana now reiterates on appeal.

SUMMARY OF ARGUMENT

We take as our starting point that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of the Univ. of California v. Bakke,* 438 U.S. 265, 290-91 (1978) (opinion of Powell, J.). Under this Court's jurisprudence, any use of racial classifications must be narrowly tailored to a compelling governmental purpose. *Shaw v. Reno,* 113 S.Ct. 2816, 2825 (1993).

The principal governmental purpose asserted by appellants is compliance with the Voting Rights Act. We offer this brief mainly to address the vital and dispositive issue of whether the Voting Rights Act requires the drawing of a maximum possible number of majority-minority districts. The act was designed to ensure access to the ballot and an equal opportunity for electoral representation. It does not require racial gerrymandering to promote the proportional representation of racial groups. In fact, such efforts are themselves destructive of our nation's social fabric and contrary to the ideals embodied in our civil rights laws. For all these reasons, racial proportionality as the end to which government action is directed, far from representing a compelling interest, is both misguided and impermissible.

ARGUMENT

I. THE VOTING RIGHTS ACT DOES NOT REQUIRE THAT LOUISIANA DRAW TWO MAJORITY-BLACK DISTRICTS. THEREFORE THE NEED TO COMPLY WITH THE STATUTE DOES NOT CONSTITUTE A COMPELLING STATE INTEREST JUSTIFYING THE RACIAL CLASSIFICATION IN THIS CASE.

Constitutional and statutory questions are intertwined in this case; the two cannot be separated. Appellees argue that the race-conscious districting in which Louisiana engaged constitutes a racial classification in violation of plaintiffs' equal protection rights. Appellants reply that if District 4 is indeed a racial classification, the state's decision meets the test of strict scrutiny; the lines were drawn to further a compelling state interest in complying with Sections 5 and 2 of the Voting Rights Act.

Two questions are thus before this Court: What does the Fourteenth Amendment allow, and what does the Voting Rights Act require? If the congressional district lines were drawn on the basis of racial classification, this

Court cannot resolve the Fourteenth Amendment question without deciding what the Voting Rights Act requires. Louisiana has no compelling interest in complying with erroneously interpreted law.

A. District 4 is clearly a racial classification; the segregation of black voters is its point.

"After reviewing the evidence, we find that Act 1 [creating District 4] can only be explained credibly as the product of race-conscious decisionmaking," the district court concluded (U.S. J.S. App. 4a). Essentially uncontroverted direct trial evidence established the existence of a racial classification (U.S. J.S. App. 51a).

A racial classification is an action in which race is a factor in the decision-making process. See *Arlington Hts. v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). The Congressional Black Caucus, in its brief, calls Lousiana's District 4 and majority-black districts in general "among the *least* segregated districts in the Nation." Brief for the Congressional Black Caucus as Amicus Curiae at 19-20. Such "minority-majority" districts are indeed not racially "segregated," if by that we mean districts whose populations are exclusively of one race. They are racially mixed, and contain substantial numbers of whites.

But integrated they are not, by any sensible definition. White voters are merely "filler" in such districts, as two proponents of racial gerrymandering have acknowledged. Aleinikoff and Issacharoff, "Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*," 92 *Mich. L. Rev.* 588, 630-31 (1993). They are included so as not to waste black ballots by excessive "packing."[1]

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[1] Whites in majority-black districts, the authors write, "should not be expected to compete in any genuine sense for

In these districts only the black ballots are meant to count. These districts are reserved for black candidates. In effect, they have a sign pasted on them: no white candidates need apply. Indeed, in 1992 several members of the U.S. House of Representatives chose to retire or move to other districts under pressure from black leaders to let blacks run racially uncontested races in newly created black majority districts. Lublin, "Gerrymander for Justice? Racial Redistricting and Black and Latino Representation," 48, 90 (1994) (unpublished manuscript). It is hardly a coincidence that the present occupant of the congressional seat from District 4 was the chairman of the Louisiana State Senate reapportionment committee that drew its convoluted boundaries. *Congressional Quarterly's Politics in America, 1994: The 103rd Congress* 650 (Duncan, ed., 1993). The district he mapped out was designed as a safe black seat.

There should be no dispute that District 4 and other majority-black constituencies constitute a racial classification. Not because they look bizarre, but because the classification of voters by race is precisely their point. Race has determined their contours. They are intentionally race-based – for a goal their proponents believe in: maximizing black officeholding. This means that race surely has been a consideration in their creation. And under this Court's case law, that is sufficient to establish the existence of a racial classification. See, e.g., *Arlington Hts., supra.*

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electoral representation" in those districts, "lest they undo the preference given to the specified minority group." *Id.* at 631.

B. District 4 was not a racial classification demanded by the law. The Voting Rights Act does not require states to maximize black officeholding by means of race-based districting.

Neither Section 5 nor Section 2 of the Voting Rights Act required the drawing of a second majority-black congressional district in Louisiana. The Department of Justice misconstrues the law. The state has a strong interest in complying with the law, but only as validly interpreted and applied. See *Shaw v. Reno,* 113 S.Ct. at 2830 (states have an interest in complying with laws that are "constitutionally valid as interpreted and as applied").

1. Section 5 protects against districting plans that are discriminatory in either effect or purpose. A plan with one majority-black district would have met the effects test for retrogression.

In *Shaw v. Reno,* 113 S.Ct. at 2831, this Court referred to the possibility that the state of North Carolina "went beyond what was reasonably necessary to avoid retrogression" – the discriminatory effect against which Section 5 guards. But in fact, it was not the state that was out of bounds; it was the U.S. Department of Justice, which directed North Carolina to create a second majority-black district. In this case, too, the Attorney General made sure the state understood its alleged obligation to draw two safe black districts. See, e.g., Jt. App. 229 (letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to Brenda Wright and Robert B. McDuff, dated April 20, 1994). In sending that signal, the Department far exceeded its statutory authority.

Some history may be useful here.[2] At the outset, the effects test contained in Section 5, the preclearance provision, was nothing more than a corollary of Section 4, which banned literacy tests in states and counties with a bad record on black enfranchisement.[3] The point of Section 5 was to make sure that the effect of that ban stuck. The demand that federal authorities preclear any new voting procedure in counties and states in which literacy tests had been suspended had an unambiguous and limited aim: guarding against renewed disfranchisement, the use of the back door once the front one was blocked.

The ingenuity of racists had kept voting rights litigators always running and always behind, and those who shaped the Voting Rights Act could not be sure that eliminating the literacy test would do the trick. As the distinguished civil rights attorney Joseph Rauh explained, the preclearance provision was included "to stop ways around . . . voting legislation . . . simply [as] self-defense." *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 399 (1965).

In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), a broader view of the provision emerged – one that allowed the Justice Department to review annexations, new district lines, and other changes affecting minority voting strength. But this Court never abandoned the "self-defense" rationale. The point of Section 5 remained protection from backsliding – from "retrogression." It was to protect gains already in place – to stop measures that left blacks worse off, deprived of electoral power they already had. See *Beer v. United States*, 425 U.S. 130 (1976); *City of Lockhart v. United States*, 460 U.S. 125 (1983).

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[2] For a full account of the history of the Voting Rights Act, including the record of judicial and administrative enforcement, see Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987).

[3] Jurisdictions subject to the ban were identified by a statistical test. States and counties in which total registration or turnout in the presidential election of 1964 had fallen below 50 percent and a literacy test had been used to screen potential registrants were assumed to have engaged in electoral discrimination. Thernstrom, *id.*, at 16-17.

If there had been two majority-black congressional districts in Louisiana prior to the 1990 census, the state could not have chosen to eliminate one. But if the state had only one – as was the case – it was not legally obligated, under the effects test in Section 5, to create another. As this Court stated in *Beer*, 425 U.S. at 141, "It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of section 5."

Louisiana did not misread Department of Justice signals, but those signals were not grounded in the law. The Department ignores the clear meaning of the statute and this Court's decisions interpreting the act.[4] The state had no compelling interest in complying with unwarranted federal demands.

2. The standard by which the Justice Department judges the question of discriminatory purpose under Section 5 is also legally unjustified.

In its correspondence with Louisiana over an earlier districting plan for the state board of education, the

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[4] Justice White in *Shaw*, 113 S.Ct. at 2838 (White, J., dissenting), states that the "Attorney General's interposition of a § 5 objection 'properly is viewed' as 'an administrative finding of discrimination'." But that finding rested on standards that this Court never has sanctioned.

Department of Justice acknowledged that the proposed lines "appear[ed] to have no retrogressive effect" and thus in large measure met the Section 5 requirement. But it refused to preclear the plan because an allegedly better one could be drawn. See U.S. J.S. App. 55a n.21. That "better" one contained a second, bizarrely-shaped majority-black district; and the failure to draw that district, the Justice Department concluded, was a sin of omission that betrayed discriminatory intent.

The state thus assumed that the Justice Department would insist that a congressional districting plan also contain a maximum number of majority-black constituencies. But the demand was indefensible. It is an interpretation of Section 5 that makes the question of discriminatory effect – to which the provision explicitly refers – superfluous; a finding of racist intent now arises to condemn every electoral plan with an allegedly insufficient number of safe black single-member districts. And it is a view that gives any organization that comes forward with a "preferable" districting scheme – one that seems to ensure more black officeholding – the potential power to veto arrangements negotiated in good faith by elected policymakers.

In short, while Louisiana was doubtless convinced that the Attorney General would insist on a second safe black congressional district, the state had no compelling interest in complying with unwarranted federal demands, an erroneously interpreted law. To hold otherwise would allow federal officials, whose wide-ranging discretion is not subject to review, to implement legal standards at odds with the statute they are charged with enforcing. Further, it is a view of discriminatory purpose at odds with this Court's decisions. See, e.g., *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).[5]

C. Section 2 is irrelevant to preclearance, and, in any case, guarantees only equal electoral access, not "racially fair" outcomes.

1. Sections 5 and 2 of the Voting Rights Act are distinct provisions; preclearance should never depend on meeting Section 2 standards.

The Justice Department led Louisiana to believe that compliance with Section 5 involved meeting the legal standard contained in Section 2 as well. The two provisions, however, are entirely separate; they "differ in structure, purpose, and application," this Court noted in *Holder v. Hall*, 114 S.Ct. 2581, 2587 (1994). As the District Court for the District of Columbia recently explained at length in two important decisions, Section 2 cannot be viewed as part of the preclearance provision; the one was never "incorporated" into the other. *State of New York v. United States, supra; Georgia v. Reno, supra.* The Department's guidelines erroneously state otherwise.[6]

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[5] Two federal district court decisions recently have condemned Justice Department administration of section 5, and specifically its approach to discriminatory purpose as contrary to law. See *State of New York v. United States*, No. 94-2219, U.S. Dist. LEXIS 19345 (D.D.C. Dec. 22, 1994); *Georgia v. Reno*, No. 90-2065, 1995 U.S. Dist. LEXIS 1421 (D.D.C. Feb. 3, 1995).

[6] Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. § 51.55 (b)(2) (1994): "In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation

In 1982, when Section 2 was transformed from an inconsequential preamble into a powerful instrument for ridding the nation of methods of election with a discriminatory "result," there was literally no discussion of changing Section 5. In fact, during the debates of 1981 and 1982, civil rights spokesmen directly and indirectly assured members of Congress that the amendment of Section 2 would not alter the preclearance provision. See, e.g., 128 Cong. Rec. 14,938 (1982) (exchange between Reps. Don Edwards and Elliott H. Levitas). Nevertheless, the Justice Department unilaterally changed the legal standards by which Section 5 is enforced, evidently on the assumption that Congress had acted without debate to drastically alter a clearly defined provision in the act. In justifying such a radical overhaul of a key provision – one whose limits were well-understood – the Department can point only to one footnote, buried in the 1982 Senate Judiciary Committee Report and unsupported by the text to which it was appended.[7]

Louisiana cannot justify the race-based contours of District 4 by alleging a compelling state interest in meeting a Section 2 standard. Those standards are irrelevant to the preclearance process, as well they should be. The subtleties of a Section 2 inquiry into complex questions of electoral opportunity demand a judicial proceeding; the process of administrative review does not suffice. The difficult factual issues of a Section 2 lawsuit, described

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of amended section 2, the Attorney General shall withhold section 5 preclearance."

[7] That footnote states that "[i]n light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982) (hereinafter "1982 Senate report").

below, cannot be adequately addressed in a summary administrative procedure.

2. Compliance with Section 2 would not in any case necessitate the drawing of two majority-black districts. The provision guarantees equal electoral access, not "racially fair" outcomes.

Section 2 guarantees equal electoral access, not "racially fair" outcomes. It is "standard remedial legislation." Butler, "Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?," 26 *Rutgers L. J.* (forthcoming 1995).[8] Before African American voters are entitled to the creation of even one safe black constituency, plaintiffs must establish a violation of their statutory right to an electoral process open to black political aspirations.

As amended in 1982, Section 2 demands that redistricting plans (and other electoral arrangements) provide minority voters with an equal opportunity to participate in the political process and to elect representatives of their choice.

But when do minority and white voters stand on "equal" electoral footing, so that a particular districting scheme can be said to be "fair"? The answer has never been crystal clear. In 1982 Congress lifted the Section 2 language directly from two constitutional decisions. In *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and *White v. Regester*, 412 U.S. 755 (1973), this Court directed trial courts to assess the electoral environment – the setting in which the voting took place. Judges had thus been asked to distinguish the failure of minority voters to elect candidates of their choice for reasons of race from normal electoral defeat – that to which every group, however defined, is vulnerable. It had been, however, a very tall order. What were the criteria that distinguished the one setting from the other?

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[8] As Butler points out, "A jurisdiction that adopts extreme measures [stringing together black residential pockets] to create majority-black districts is akin to a manufacturer paying punitive damages to potential purchasers of its product prior to anyone suffering an injury or establishing a defect in the product." *Id.*

It was not clear and it could not be. Unequal electoral opportunity was an elusive concept. Did black and white Democratic Party voters stand on the same electoral footing when the candidates of their choice were regularly defeated in a Republican county? Or were blacks distinctively entitled to some degree of representation? As Justice Frankfurter observed, we can only know if voters are improperly represented if we know what it means to be properly represented. *Baker v. Carr,* 369 U.S. 186, 299-302 (1962) (Frankfurter, J., dissenting). And yet we lack a theoretical framework to decide. The point still holds 23 years later.

Nevertheless, if Section 2 required courts to measure an inadequately defined phenomenon – electoral inequality – it did not leave judges entirely clueless. Some guidance was provided. In *Whitcomb, supra,* this Court unequivocally rejected the view that a showing of disproportionately low minority officeholding and evidence of black residential clustering would suffice to establish electoral discrimination. By lifting language directly from *Whitcomb* and from *White, supra,* Congress thus rejected the notion that black voters were entitled to legislative seats reserved for black representatives. Minority voters were guaranteed not their "fair share" of political offices, but only a "fair shake" – a chance to play the electoral game by fair rules.[9] In fact, the language of section 2 – guaranteeing minority voters an equal opportunity "to elect representatives of their choice" – plainly suggested a definition of representation broader than that which would have been conveyed had the phrase read "*minority* representatives of their choice."

In addition, the concern clearly was with election contests in racist settings. Black voters, Congress concluded, lacked an equal chance to elect representatives of their choice where race had left them politically isolated – without potential allies in electoral contests. That focus was spelled out by numerous witnesses at the 1982 hearings and in the Senate Judiciary Committee Report as well.

Thus, the Report listed "factors" to which courts were instructed to refer in judging the merits of a vote dilution suit. They included a history of discrimination, racial polarization, a candidate slating process to which minorities were denied access, political campaigns characterized by racial appeals, and a lack of responsiveness on the part of public officials to minority interests. 1982 Senate Report at 28-29; Thernstrom at 192-197. The point of the list was clear: to help judges identify those situations in which either a history of discrimination or ongoing racism had left minority voters at a distinctive disadvantage in the electoral process. Not only the list, but other language in the Report signalled the importance of past and present racism. The concern, the report noted, was with those exceptional communities in which racial politics still dominated the electoral process. 1982 Senate report at 32.[10]

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[9] The "fair share," "fair shake" distinction is taken from Blumstein, "Defining Discrimination: Intent vs. Impact," *New Perspectives* (Summer 1984), at 29, 30. See also Abram, "Affirmative Action: Fair Shakers and Social Engineers," 99 *Harv. L. Rev.* 1312 (1986).

That was the message as well of a number of civil rights advocates who testified at the 1982 hearings. For instance, Armand Derfner, a leading civil rights attorney and key witness, argued that single-member districts had "no precisely correct racial mix." The entitlement was not to districts that were, say, two-thirds black. Section 2 only promised an electoral process that was fluid – open to racial change – not "frozen." Courts were expected to ask if minority voters would have "some influence." *Voting Rights Act: Hearings on S. 1992 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 803 (1982) (testimony of Armand Derfner). Claims of dilution would rest, Derfner said, on "evidence that voters of a racial minority [were] isolated within a political system . . . 'shut out,' i.e. denied access . . . [without] the opportunity to participate in the electoral system." *Id.* at 810 (prepared statement of Armand Derfner).

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[10] The 1982 Senate report also cited *McCain v. Lybrand*, No. 74-281, slip op. (D.S.C. Apr. 17, 1980), as an illustration of the faithful application of the already familiar "results" test. The plaintiffs had prevailed in that decision because black candidates, the court found, tended to lose elections "not on the merits but solely because of their race." A report issued by the Subcommittee on the Constitution of the Senate Judiciary Committee had expressed concern that this distinction would be lost. Not so, declared the full committee's report. In "most" jurisdictions, white voters give substantial support to black candidates. But "unfortunately . . . there are still some communities . . . where racial politics do dominate the electoral process." And in such communities "a particular election method can deny minority voters equal opportunities to participate meaningfully in elections." 1982 Senate Report at 33.

No witness, however, offered a definition of that total electoral exclusion against which the act protected, except to say that the test had been met when a group had "really been unfairly throttled." *Id.* at 803. "Unfairly throttled," that is, by racism, the entire history of the act made clear.

Some will argue that an interpretation of Section 2 that makes racist exclusion the test of electoral discrimination is at odds with the stated aim of those who amended the statute in 1982. Not at all. The objection in 1982 to the decision in *Mobile v. Bolden*, 446 U.S. 55 (1980), was to the demand that plaintiffs produce a "smoking gun." Advocates did not object, in other words, to the focus on racism, but only to this Court's alleged insistence on direct evidence of racist intent.

In sum, in revising Section 2 Congress unequivocally and properly rejected the notion of group entitlement to even one legislative seat – however concentrated or dispersed black residential patterns were found to be. Had witnesses at the 1982 congressional hearings lobbied for an amended statute that would encourage race-based districting and thus guarantee legislative seats for members of designated minority groups, their arguments certainly would have fallen on deaf ears. Such a demand was not even remotely politically possible.

Section 2 did not necessitate the drawing of Louisiana's District 4 – Justice Department demands to the contrary notwithstanding. Louisiana may have drawn a second majority-black district in order to avoid costly and disruptive litigation. Redistricting is a politically complex and laborious process, and to present a plan that is rejected is a waste of extensive political effort. That the state sought to avoid rejection is understandable, but it is not a compelling state interest that justifies a racial classification.

D. This case is not aberrational. The Justice Department's reading of the Voting Rights Act has long been at odds with the statute, and its extra-legal role in the preclearance process should be examined by this Court.

The voting rights section of the Justice Department's Civil Rights Division has assumed freewheeling power to object to districting plans that did not seem "right" – racially "fair" – since at least 1980.[11] In 1981, for instance, a Justice Department memo on county council districts for Barbour County, Alabama, explained that calculating what was "fair" was simple. "Since blacks constitute 40.5 percent of the voting age population, they would be entitled to 2.8 districts [that is, two viable districts plus a third influence district]." The voting rights section itself drew up the "right" plan. Such calculations had become a routine part of the preclearance process. Thernstrom at 171-72. More recently, with the availability of sophisticated computer software, those calculations have become much more fine-tuned.

Under section 5, the voting rights section acts in a quasi-judicial role. The legal standards it uses to enforce section 5 should track those that this Court has developed. In practice, however, maximization has become the test of racial fairness by which the Justice Department routinely judges districting plans.[12] The New Orleans plan approved in *Beer* would not now pass administrative review; what this Court precleared, the Justice Department will not. When the Department does acknowledge the retrogression standard, as in this case, it imports into section 5 a definition of discriminatory purpose also unsustained by the law. *State of New York v. United States, supra; Georgia v. Reno, supra.*

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[11] This criticism is developed in detail in Thernstrom, chapter 8; and in Butler, "Reapportionment, the Courts, and the Voting Rights Act: A Resegregation of the Political Process?" 56 *Univ. of Colo. L. Rev.* 21 (1984).

[12] During the Bush administration, the obligation to draw a maximum number of majority-minority districts became no secret. The assistant attorney general for civil rights regularly insisted that minority voters were entitled to their "fair share" of political power. (See, e.g., Mr. Dunne's speech to the American Bar Association, Atlanta, Georgia, August 10, 1991, cited in

Both the court below and the district court in *Johnson v. Miller*, 864 F.Supp. 1354 (S.D. Ga. 1994), *prob. juris. noted*, 115 S.Ct. 713 (Jan. 6., 1995) (No. 94-631), raised serious concerns over the Justice Department's coercive role in bending local jurisdictions to its wishes. See, e.g., U.S. J.S. App. 53a-57a n.21. The circumstances were particularly egregious in the Georgia case, where Justice Department lawyers who have the responsibility to make impartial preclearance determinations worked in active concert with outside groups who wanted race-conscious districts. The state of Georgia, the district court found, was forced by the Justice Department to accept the American Civil Liberties Union's "max-black plan." *Johnson*, 864 F. Supp. at 1360-63. The ACLU's attorney, Ms. Kathleen Wilde, developed a relationship with the voting rights section that was "informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." *Id.* at 1362.

It is of vital importance that this Court once again give clear guidance as to the legal standards contained in

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Thernstrom, "*Shaw v. Reno*: Notes from a Political Thicket," *1994 Public Interest L. Rev.* 39. There is literally no disagreement, across the political spectrum, that the Justice Department has construed the Act to require the creation of majority-black single-member districts wherever possible. Indeed, the question has now become the limits, wisdom, and application of that strategy. See, e.g., Guinier, *The Tyranny of the Majority* (1994).

Sections 5 and 2; without such guidance, the Justice Department has *carte blanche* discretion to insist that jurisdictions follow its dictates or come to Washington to defend their actions. The Voting Rights Act fundamentally altered traditional federal-state relations. Federal intrusion into constitutionally sanctioned local prerogatives is all the greater when the legal parameters are unclear and decisions are made on the basis of unbounded administrative whim.

II. THIS COURT'S RESOLUTION OF THESE NARROW STATUTORY ISSUES WILL HAVE PROFOUND CONSEQUENCES FOR OUR FUTURE AS A MULTIRACIAL, MULTIETHNIC SOCIETY.

District 4 is a racial classification for familiar affirmative action ends.[13] The point of Louisiana's race-conscious districting was precisely that of most affirmative action policies: to provide maximum protection for blacks from white competition. Law school affirmative action programs, by setting separate admissions standards, pit black applicants primarily (sometimes only) against other blacks. Likewise, "safe" black legislative districts amount to protective racial sorting. Their object is to ensure electoral contests in which black candidates compete only against other black candidates, eliminating potential white competitors.

Questions involving affirmative action in the electoral sphere are not simply about who ends up in which district. They go to the very heart of how we see ourselves as a multiracial, multiethnic nation. At issue between the opposing sides in this case are quite different views of American society, the place of minorities in it, the society's openness to change, the nature of democratic representation, and the costs of race-conscious policies. This Court's decision will shape our future in far-reaching ways.

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[13] By "affirmative action," we mean race-conscious action to secure equal outcomes for certain designated groups.

A. Affirmative action policies are unnecessary and quite possibly counterproductive in the electoral sphere.

1. The premise that blacks can get elected in majority-white settings only very rarely and under exceptional circumstances is not supported by the evidence. Black officeholding does not depend upon majority-black constituencies; whites frequently vote for black candidates.

Black candidates cannot get elected in majority-white settings, the brief for the Congressional Black Caucus argues. That is "contemporary reality." Brief for the Congressional Black Caucus at 1. The doors of political opportunity are still closed. Black candidates remain at the mercy of racist white opposition. Hence the need for protective policies – for race-based districts drawn to ensure black officeholding, which was an implicit statutory promise.

This assessment of the American racial landscape is not only bleak, but wrong. The evidence is not sufficient to support the assertion. And if it was, it would not justify drawing race-based districts. Plaintiffs cannot prove a section 2 violation simply by pointing to disproportionately low minority officeholding.

Whites not only say they will vote for black candidates; they do so, often casting their ballots for an African American running against a white opponent. That choice is most often available in mayoral contests. Conventional wisdom has it that the overwhelming majority of black mayors have been elected from majority-black cities. This is true but misleading. Most of those black "cities" are in fact tiny majority-black towns in the South. Eliminate those small urban dots on the southern map, focus on cities of 50,000 or more in population, and quite a different picture emerges. Eighty-three percent of the black mayors elected in such cities over the last thirty years have not had the benefit of a majority-black constituency. Sixty-one percent were elected in municipalities less than 40 percent black, and 43 percent took office in cities less than 30 percent African American.[14]

It is not only in races for a mayor's seat that white voters choose black candidates over those who are white. L. Douglas Wilder, in his successful gubernatorial run in 1989, received an estimated 40 to 43 percent of Virginia's white vote. Skeptics will say that figure still represents only a minority of the white electorate, but Charles Robb, the white Democratic governor who preceded Wilder, did only a shade better – 45 percent. Illinois (11.6 percent black) elected Carol Moseley-Braun as its U.S. Senator in 1992. In 1994, Ohio elected J. Kenneth Blackwell as state treasurer and New York chose H. Carl McCall as state comptroller. Also in 1994, J.C. Watts won a congressional seat in an 83 percent white Oklahoma district. This is not a new phenomenon. Andrew Young was elected to Congress in 1972 from Georgia's fifth district, which was then majority-white.

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[14] The data are contained in Thernstrom and Thernstrom, "The Promise of Racial Equality," in *The New Promise of American Life* (Alexander and Finn eds. 1995).

2. There is no evidence in this case that African American candidates cannot get elected from majority-white districts in Louisiana.

Much is made in the brief for the Congressional Black Caucus of the fact that no black member of Congress from a majority-white constituency has been elected in Louisiana. Hence the need for safe black constituencies. In fact, for three reasons that record is not particularly telling.

One, the past is not the future. White racial attitudes have been changing fast, and the record of black electoral success in 1975 tells us little about the prospects for such success in 1995.

Two, black candidates cannot win contests they do not enter. And scholars who attempt to assess white willingness to support black candidacies on the basis of election returns cannot learn anything from Louisiana elections in which no black candidate has been in the race.

Three, congressional candidates – whatever their color – cannot win elections if their political views are at odds with the majority of voters in their district. California Rep. Ronald V. Dellums gets elected from a constituency that includes Berkeley and like-minded suburbs, but few majority-white districts are as left-leaning as his. Particularly in the South, centrist and conservative candidates (whether white or black) will do better than those who are militantly liberal. J.C. Watts, a conservative black Republican, likely would not have been elected in Oklahoma had he run as a liberal Democrat.

Some argue that centrist or conservative black candidates who can attract strong white support are not "authentically" black. See, e.g., Guinier at 55-58. Apart from the demeaning perception that individual blacks share a common and distinct perspective, this view is contradicted by polling data, which find African Americans divided on many issues. See, e.g., Bolick, "Blacks and Whites on Common Ground," *Wall St. J.*, Aug. 5, 1992, at A14. Indeed, many of the nation's recently elected black mayors are fiscal conservatives, tough on crime, and opposed to busing.

In any case, the Voting Rights Act is ideology-blind. There is no legal basis for holding that blacks who run as moderates or conservatives are no longer "black" in terms of "counting" for purposes of representation.

3. The Voting Rights Act is a statute to protect black voters, not officeholders. Race-based districting does not necessarily protect black voters.

All elected officials – including, of course, members of the Congressional Black Caucus – like safe constituencies from which to run. District 4 is a safe constituency. Majority-black districts almost inevitably elect black legislators; black voters (unlike those who are white) tend to vote as a bloc – a consequence of the relative novelty of their electoral power.

Safe black districts are a gift to black politicians. But they are not necessarily in the interest of black voters or in the public interest. As Blumstein notes, determining whether majority-minority districts are advantageous to black voters involves subtle issues. Blumstein, "Racial Gerrymandering and Vote Dilution – *Shaw v. Reno* in Doctrinal Context," 26 *Rutgers L. J.* (forthcoming 1995). Such districts frequently may marginalize the black elected officials upon whom the voters count to represent their interests effectively. Politics is the great melting pot; elected officials who ignore constituents do so at their peril. A greater dispersion of black voters over more "influence districts" may often result in better representation of black voters, since more public officials, both black and white, will owe their election in part to black support. Moreover, draining majority-white districts of black voters means fewer opportunities for black candidates: the "floor" for representation ultimately creates a ceiling.

4. Affirmative action policies must be temporary, and subject to modification or curtailment when their remedial objectives are accomplished. But once created, racially-gerrymandered districts will be far more difficult to root out.

Legislative districts that protect black candidates from white competition serve an affirmative action purpose. They are analogous to separate lists for black and white candidates for spots on a police force or seats in a medical school class. They differ, however, in a crucial respect. Preferential admissions and hiring policies are, in theory, temporary; their life will end, proponents argue, when such protective racial sorting is no longer necessary. That is not likely in the case of racially gerrymandered legislative districts.

If such districts are allowed to stand, they are likely to be permanent. Consideration of incumbency politics aside, in the covered jurisdictions of the South and elsewhere, the retrogression test of Section 5 forbids backsliding – any decrease in the number of secure black legislative seats. Plans approved today become the absolute baselines against which subsequent districting changes are measured through at least 2007, when section 5 is now scheduled to expire. *Johnson*, 864 F. Supp. at 1386 ("[A]ny redistricting plan designed for proportionality, that is upheld by the Court today, will not be easily uprooted in the foreseeable future").

B. Proportional representation is the standard of racial fairness that runs through appellants' briefs. That standard assumes the necessity of protective racial sorting in a severely divided society. America is not such a society.

That in a racially fair political system blacks would hold office in proportion to their numbers in the population is a conviction that runs through all the briefs for appellants. See, e.g., Brief for the United States at 12. Disproportionately low black officeholding denies representation to a group for whom members of no other group can speak. In severely divided societies, whites cannot speak for blacks, or (by logical extension) blacks for whites. Blacks, it is assumed, are a nation within our nation, a people apart. And as such, they are entitled, as a matter of elementary fairness, to representation in proportion to their population strength.

1. The evidence does not support the view that blacks are a people apart, and our public law should not treat them as such.

In 1945, the novelist and social critic Richard Wright described his boyhood days in a South in which "whites had drawn a line over which we dared not step." Wright, *Black Boy* 251 (1945). That line has disappeared, and the position of African Americans within American society has been transformed. More than 80 percent of blacks polled in national surveys report having whites as neighbors. Feigelman and Gorman, "Blacks Who Live Near Whites: 1982 and 1987," 74 *Sociology and Social Research* 32, 202-07 (July 1990). Few whites say that they wouldn't want to live next door to a black family, although 30 percent object to having a Fundamentalist as a neighbor. Schuman, Steen, and Bobo, *Racial Attitudes in America: Trends and Interpretations* 106-07 (1985); see also Bates, *Battleground* 64 (1993). African Americans are permanent and influential political players – in both North and South. They are partners in powerful law firms, and doctors at distinguished hospitals. An African American model in an upscale Bloomingdale's clothing ad is now business as usual; as are black actors in television commercials selling every sort of product. The Bill Cosby show, watched by 20 million viewers, earned NBC a billion dollars.

African Americans still have incomes below the national average, are less likely than whites to have a college degree, have higher poverty rates, and rank behind whites in most measures of socioeconomic status. But they are no longer a people apart. They have become part of the American mainstream. As the district court noted in *Johnson v. Miller*, 864 F. Supp. at 1390, "Blacks in Georgia did indeed rise from a common heritage of slavery and oppression, but with the shedding of those burdens they have begun to follow myriad, distinctive paths."

Until the 1960s almost all of the small numbers of black students attending college were to be found in historically black institutions; today the number in higher education has grown explosively, and six out of seven attend predominantly white institutions. Black separatist political movements go nowhere. This picture obviously could be enlarged, but the point should be clear. The United States is not yet a fully integrated society, but it has moved in that direction with impressive speed in the four decades since *Brown v. Board of Educ.*, 347 U.S. 483 (1954). In 1995, blacks no longer need extraordinarily protective arrangements that consign them to a separate electoral caste.

2. The legal ratification of the notion of two societies – one white and one black – may make it a self-fulfilling prophecy.

African Americans are not a racially-defined nation within our nation. And yet if both blacks and whites believe they are, it may well become true. This is especially the case if that perception informs the law. Separate admissions procedures for whites and blacks, separate hiring processes, separate legislative districts: given a stamp of approval by Congress and this Court, they will paint an official, influential, and perverse portrait of American society.

The drive for proportionate racial and ethnic representation by means of race-based districting is informed by unwarranted pessimism, which if embodied in law threatens to do far more harm than good.

3. Even if blacks remain a separate group within American society, with identifiable political interests firmly tied to their race, the deliberate gerrymandering of majority black districts cannot be justified.

Our form of democracy makes no provisions for the representation of "interest groups," racial or political. Unlike some other democracies where political parties are formed around interests and a party's numbers in the legislative body are determined by the share of the vote it receives, our representational system is not designed to represent group interests. By contrast, in proportional representation systems, groups such as environmentalists or ethnic minorities, for example, may be directly represented in the legislative body by parties organized for that purpose, whose exact numbers in the body are determined their share of the vote.

In the United States, all interest groups must work out their political fortunes within the confines of a representational system based on geographically constructed districts. Thus here, environmentally oriented voters will be represented in the legislative body by the representatives elected from their geographically based districts – representatives for whom the environment will be only one of many items on their legislative agenda. Likewise, Democratic voters living in a Republican controlled district are "represented" by the Republican, even if they voted for someone else.

Gerrymandered race-based districts are an attempt to provide minorities, and only minorities, with direct group representation, free from the constraints our geographically based districting system places on the representation of all other interests. See, e.g., Butler, "Affirmative Racial Gerrymandering." To impute to Congress an intent to permanently remove one group from the pluralism of American politics not only misreads the basic objectives of the Voting Rights Act, but would ensure the very segregation the act was intended to cure.

C. Racial classifications are dangerous to everyone. The harm is to whites and blacks alike.

"All citizens are stigmatized by the notion that their 'interests' can be defined by race or will be represented adequately only if a member of their racial 'group' holds a particular office," the district court concluded. U.S. J.S. App. 11a. It was true as well of the segregated institutions of the Jim Crow South. Blacks and whites were both harmed when drinking fountains carried "white" and "colored" signs.

Racial classifications, in short, deliver the message that skin color matters – profoundly. They suggest that white folks and black folks just are not the same, that race and ethnicity are the qualities that really matter. Individuals are defined by blood – not by character, social class, religious sentiments, age, or education. But categories appropriate to a caste system are a poor basis on which to build that community of equal citizens upon which democratic government depends. Equal citizens are free to define themselves, and do so differently in different contexts. A voter whose choice of a candidate in a presidential primary is shaped primarily by racial considerations might react to the issues in a school board contest as parents of other races do. It is precisely that fluidity of individual political identity that prevents the formation of castes, which are rigid and hierarchical by nature.

"The destinies of the two races, in this country, are indissolubly linked together," Justice Harlan wisely noted in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).[15] It is obviously the case. And yet race-based districting works to separate the races, sending them their separate political ways.

No decisions this Term are more important than those involving racially-driven districting. If this Court overturns the lower court's judgment in this case, it will have signed on to a badly mistaken notion of American society – one that sees white racial attitudes as little changed since the 1960s; a racial divide that creates two nations, separate and unequal; blacks as politically excluded and thus in need of extraordinary protection from white competition. If embraced by the law, that view will perpetuate and encourage group-based thinking.

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[15] On Harlan's dissent and the history of the color-blind idea, see Kull, *The Color-Blind Constitution* (1992).

Ours is a nation of individual citizens, not a confederation of racial and ethnic groups. We need the Court's help to stay the course.

Respectfully submitted,

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Nos. 94-558 and 94-627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES, *Appellant,*

v.

RAY HAYS, *et al.,* *Appellees.*

STATE OF LOUISIANA, *et al.,* *Appellants,*

v.

RAY HAYS, *et al.,* *Appellees.*

On Appeal from the United States District Court for the Western District of Louisiana

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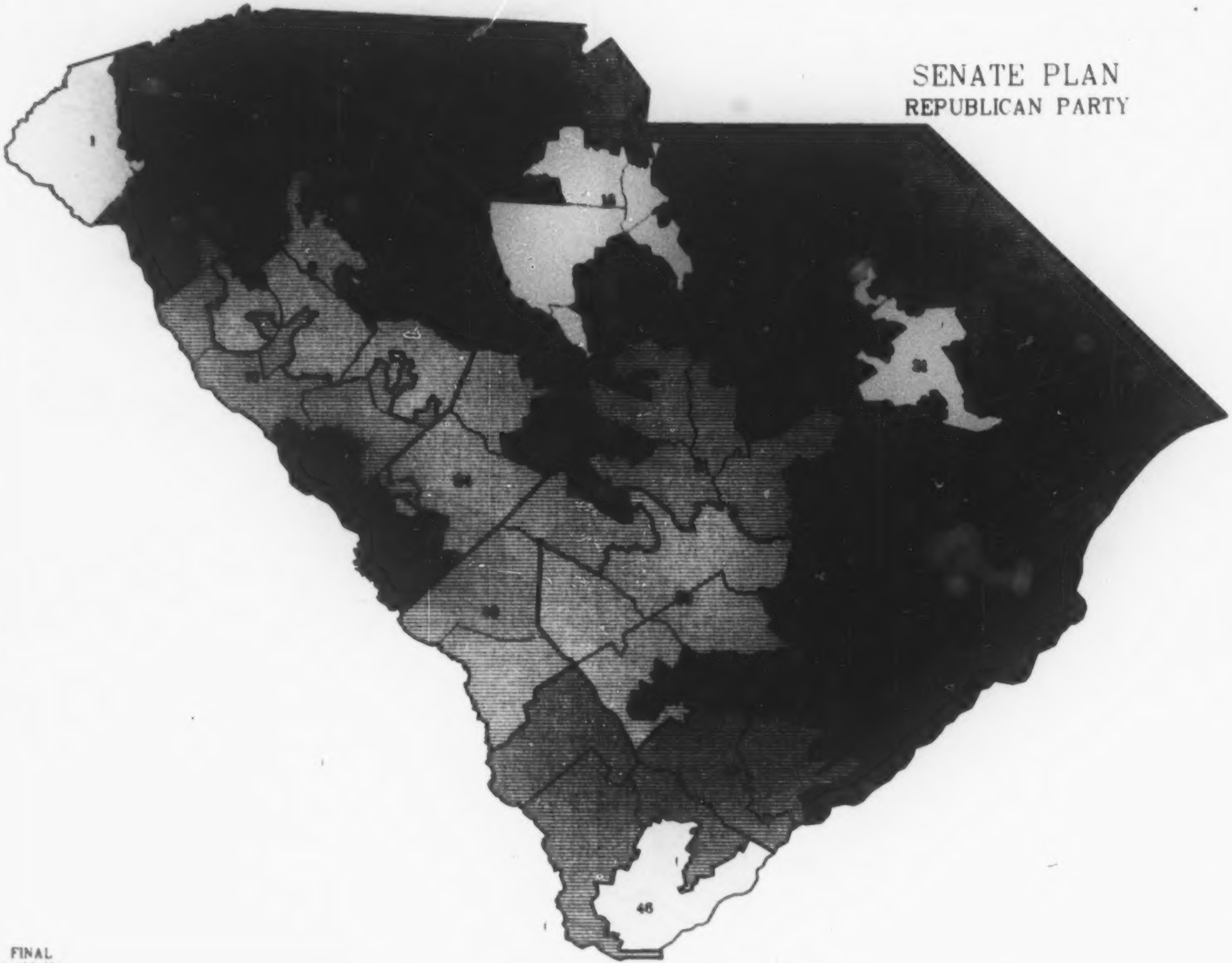
REPUBLICAN PARTY



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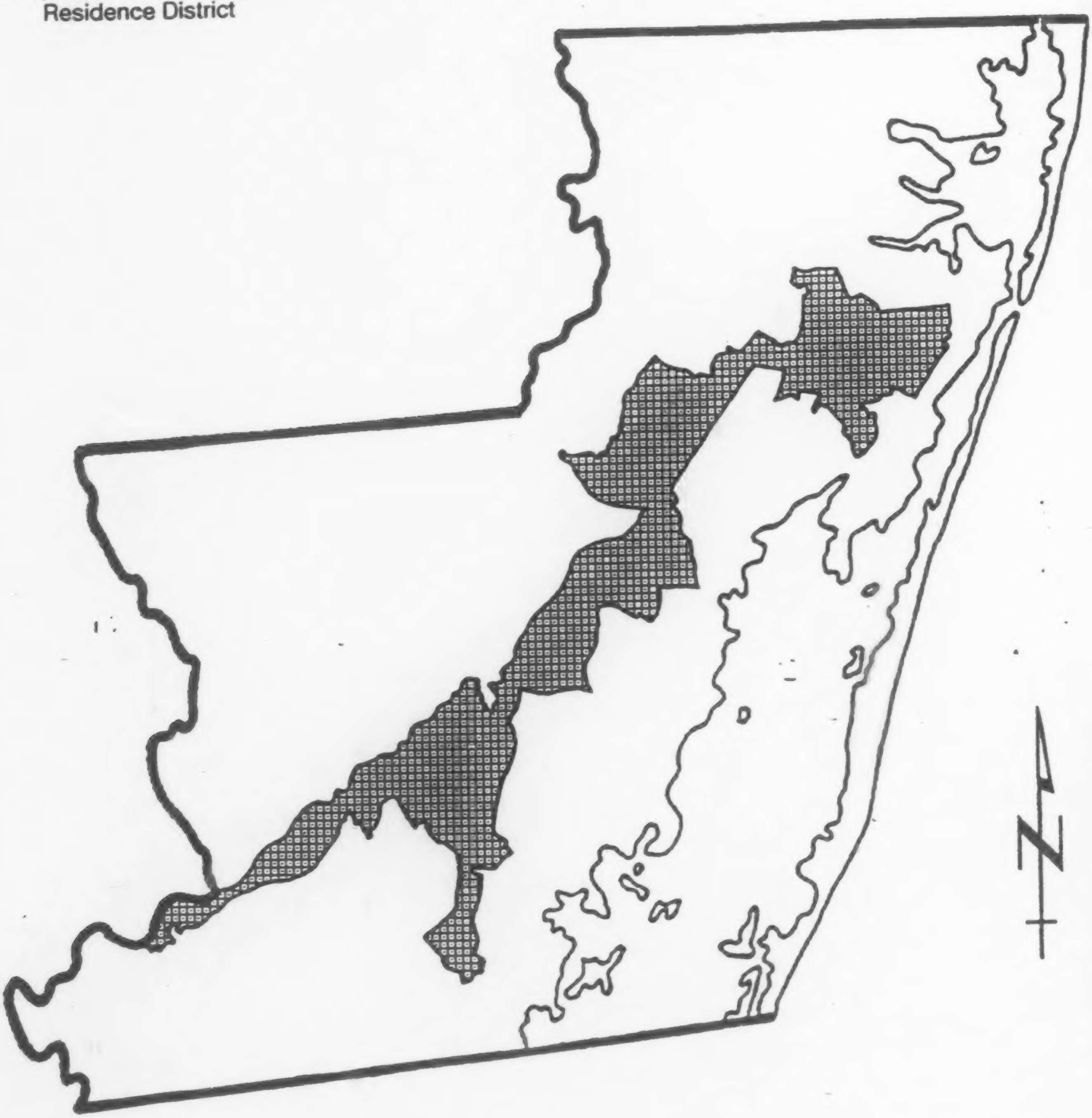
WORCESTER COUNTY, MARYLAND

Proposed NAACP Minority Commissioner Residence District



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Nos. 94-558, 94-627, 94-631, 94-797, 94-929

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STATE OF LOUISIANA, *et al., Appellants*
v.
RAY HAYS, *et al., Appellees*

On Appeal from the United States District Court
for the Western District of Louisiana

ZELL MILLER, *et al., Appellants*
v.
DAVIDA JOHNSON, *et al., Appellees*

On Appeal from the United States District Court
for the Southern District of Georgia

BRIEF OF RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, and DOROTHY G. BULLOCK, as AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* -- Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett, and Dorothy G. Bullock -- are the five North Carolina voters who, in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), attacked that

State's congressional redistricting as a racial gerrymander. After this Court ruled there that they had stated a claim for relief, the three-judge District Court held on remand that they had established a racial gerrymander, but a majority concluded that the State had shown a compelling governmental interest and a narrowly tailored remedy. From that decision they have appealed and filed their jurisdictional statement in this Court. *Shaw v. Hunt*, (No. 94-923). Thus, the *amici* have a continuing interest in assuring that they and other voters are not deprived of equal protection by the use of explicit or implicit racial classifications in the creation of congressional districts.

The *amici*, however, are not surrogates or proxies for any group; nor are they exponents of group rights. Instead they are individuals who -- at their own expense -- have been contesting for three years what they believe to be unwarranted reliance on racial classifications in the election of Representatives to the United States Congress. Because of their extensive involvement in *Shaw*, the *amici* have acquired insights and information which they believe will be helpful to the Court in deciding the present appeals from decisions overturning racial gerrymanders in Louisiana and Georgia. Moreover, the *amici* believe that their brief will assist the Court in evaluating the assertions and argument in the *amicus* brief that the State of North Carolina -- along with Texas -- has submitted in connection with these appeals.

SUMMARY OF ARGUMENT

Since this Court's decision in *Shaw*, desperate efforts have been made to evade or to limit the logical implications of the majority opinion. Indeed, to this end, a calculated campaign of ridicule and invective was initiated against *Shaw* --especially by some of the beneficiaries of the racial classifications whose use the majority opinion denounces.[1]

In like fashion, the appellants and their allies now seek cunningly to minimize the impact of *Shaw* by asking this Court to impose an unwarranted requirement that plaintiffs attacking a racial gerrymander establish the "bizarreness" of the districts involved. Moreover, the appellants erroneously minimize the importance of "traditional districting principles" and treat as irrelevant familiar concepts like "compactness" and "contiguousness".

To justify the egregious racial gerrymanders of Louisiana and Georgia, appellants seek to transmute into a "compelling state interest" the unauthorized expansion of Section 5 of the Voting Rights Act by the Civil Rights Division and the craven capitulation of State officials to that "power grab" by Federal bureaucrats.[2] To bolster their weak justification of the racial gerrymanders, the appellants seek to turn the burden of persuasion on its head. Then they distort the plain meaning of "narrow tailoring" by extending the concept to encompass the creation of dysfunctional majority-minority districts without full consideration of less disruptive alternatives. Finally, the appellants mistakenly praise their handiwork as a remedy for racial polarization -- when, in fact, it is just the opposite.

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[1] For example, there have been comments that the opinion was concerned with "aesthetics"; and Congressman Melvin Watt -- who represents North Carolina's serpentine, majority-black Twelfth District -- has stated on national television that he believed the assumptions of the majority opinion in Shaw were "racist". *See* Jurisdictional Statement in *Shaw v. Hunt* No. 94-923, p. 7, n.6.

ARGUMENT

I. Creating Congressional Districts On The Basis Of Race Violates Equal Protection Whether Or Not The Districts Are "Bizarre".

The complaint which this Court considered in *Shaw* contained allegations that North Carolina's two majority-black districts were "amorphous" (par. 28) and "bizarre" (par. 36A) [3] However -- despite the appropriateness of these two adjectives -- an examination of the entire

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2 In the present context, for State officials to rely as a defense on their own acquisition in the unwarranted assertion of authority by the bureaucrats of the Civil Rights Division is the functional equivalent of the "Nuremberg defense" -- and is equally unconvincing.

3 *See* Jurisdictional Statement in *Shaw v. Reno* (No. 92-357) at pp. 88a, 103a.

complaint makes clear that it is premised on the fact that racial classifications were used in creating the congressional districts. *Id.* at 67a, 107a. Nonetheless, the appellants in *Hays* and *Johnson* and their supporting *amici* have attempted to make *Shaw* almost irrelevant by insisting that "bizarreness" of the racially gerrymandered districts is a necessary part of the claim for relief and that -- with the possible exception of the two majority-black districts involved in *Shaw* itself -- there simply are no districts which are so extraordinary as to fulfill this requirement.

This limiting interpretation cannot be reconciled with *Shaw's* own emphasis that, under the Equal Protection Clause, all purposeful racial classifications are subject to strict scrutiny. *See* 113 S.Ct. at 2824-25. According to the Court, equal protection "demands strict scrutiny of all racial classifications". 113 S.Ct. at 2830. Indeed, the Court quotes an earlier pronouncement that a "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification". *Id.* at 2825, quoting *Personnel* **Adm'r v. Feeney,** ***442 U.S. 256, 272 (1979).***

A half century ago, this Court stated that:

> Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.

Hirabayashi v. United States, 320 U.S. 81, 100 (1943); *see also Koramatsu v. United States,* 323 U.S. 214, 216 (1944)("the most rigid scrutiny required").

There the use of such classifications was reluctantly upheld, because of a perceived danger to national security during a declared war;[4] but this Court has never retreated from its hostility to the use of racial classifications[5] -- whether they were overt or concealed.[6] To introduce a requirement that plaintififs attacking a racial gerrymander

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4 In retrospect, the supposed justification for the exclusion of Japanese-Americans from the West Coast and their internment appears questionable. *Korematsu v. United States*, 584 F.Supp. 1406 (N.D.Cal.1984); *Hirabayashi v. United States,* 828 F.2d 591 (9th Circuit 1987). This unhappy history illustrates the need for exceptional caution in undertaking the "benign" use of racial classifications.

5 *See e.g., Loving v. Virginia,* 388 U.S. 1, 11 (1967); *Palmore v. Soditi,* 466 U.S. 429 (1984); *Powers v. Ohio, 499* U.S.400 (1991).

6 In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the use of the racial classification was not explicit but was implicit in changing the shape of the City of Tuskegee from a square to a 28-sided figure.

on equal protection grounds must show "bizarreness" of the districts would constitute such a retreat. At the same time, it would unnecessarily require this Court and the lower courts to establish criteria for "bizarreness".

As the Court recognized in *Shaw* (at 2827), a "bizarre" district reminds voters that, with specific governmental approval, racial stereotypes are being relied on in the electoral process. This, in turn, may enhance racial polarization by appearing to bless it. However, the crucial factor is the governmental use of racial classifications to achieve an intended result -- whether or not the voters are fully aware of that use or that result. Indeed, if the Court accepted appellants' contention that proof of "bizarreness" is required, a state legislature's stated purpose to draw district boundaries along racial lines would require no scrutiny, so long as a court was unpersuaded that the districts created were "bizarre". Creating such an exception would be inconsistent with this Court's emphatic disapproval of reliance on racial or gender stereotypes.[7] Moreover, to allow such an

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[7] *Powers, supra,* n.5; *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991); *J.E.B. v. Alabama ex rel T.B.,* 114 S.Ct. 1419 (1994); Note, 44 DUKE L.J. 298 (1994). The Court also has held invalid the use for governmental purposes of boundaries drawn along religious lines. *Board of Education of Kiryas Joel Village School District v. Grumet,* 114 S.Ct. 2481 (1994). Of course, permitting a peremptory challenge or taking other governmental action which has a disparate effect on a particular racial or ethnic group will not violate the Equal Protection Clause when the action is taken for a reason independent of race or

(continued...)

exception would be inconsistent with the rationale for recognizing "the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification". *Id.* at 2830. *See also* Note, 44 DUKE L.J. 298 (1994).

Although not required as an element of the claim for relief under the Equal Protection Clause, "bizarreness" does have an important evidentiary role. As the three-judge District Court recognized in *Hays,* 839 F.Supp. 1188, 1194-5 (W.D.La. 1993) the redistricting map may point unerringly to the racial motivation for the plan being attacked. Indeed, when, during oral argument in *Shaw*, the members of this Court looked at the map of the North Carolina congressional districts, they must have had little doubt as to the underlying purpose. [8]

7(...continued)
ethnicity. *Hernandez v. New York, 500* U.S. 352 (1991).

[8] The District boundaries may provide strong circumstantial evidence of a racial gerrymander. However, there may be other types of evidence. For example, there may be statements of legislators -- like those of North Carolina Senator Dennis Winner who, after meeting with Assistant Attorney General John Dunne on December 17, 1991 (the day before North Carolina had been denied Section 5 preclearance), informed his fellow Senators that Dunne wanted "quotas". *See,* Jurisdictional Statement in *Shaw v. Hunt,* No. 94-923 at p.13. Moreover, the heavy-handed tactics of the Civil Rights Division in denying Section 5 preclearance have made clear the racial

(continued...)

In addition to being evidentiary, "bizarreness" of districts, if present in a plan drawn along racial lines, will be an aggravating factor because it tends to make those districts dysfunctional. Judge Edith Jones described this harm in some detail in *Vera v. Richards:*

> Traditional, objective districting criteria are a concomitant part of truly "representative" single member district plans. Organized political activity takes place most effectively within neighborhoods and communities; on a larger scale, these organizing units may evolve into media markets and geographic regions. When natural geographic and political boundaries are arbitrarily cut, the influence of local organizations is seriously diminished. After the civic and veterans groups, labor unions, chambers of commerce, religious congregations, and school boards are subdivided among districts, they can

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8(...continued)
purpose for creating the gerrymandered majority-minority districts. However, the proponents of these districts do their best to obscure the facts with euphemisms. For example, sometimes the term "minority opportunity" district is used in place of "majority-minority". *See e.g.*, the Amicus Brief of the State of Texas at p. 14. Likewise, there sometimes is a failure to make clear that "majority-minority" does not mean that there is no majority of any race but, instead, that it means that a "minority" constitutes more than half the voting age population of a district. Another tool for obscuring the presence of a racial purpose is provided by "*post hoc* rationalizations" --whose use was denounced by the three-judge District Court in *Hays, supra* at 1203.

> no longer importune their Congressman and expect their Congresman to wield the same degree of influence that they would if all their members were voters in his district. Similarly, local groups are disadvantaged from effectively organizing in an election campaign because their numbers, money, and neighborhoods are split. Another casualty of abandoning traditional districting principles is likely to be voter participation in the electoral process. A citizen will be discouraged from undertaking grass-roots activity if, for instance, she has attempted to distribute leaflets in her congressman's district only to find that she could not locate its boundaries.

861 F.Supp. at 1334 n. 43. [9]

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[9] Judge Jones added:

> As the influence of truly local oroganizations wanes, that of special interests waxes. Incumbents are no longer as likely to be held accountable by vigilant, organized locala interests after those interests have been dispersed. The bedrock principle of self-government, the interdependency of representatives and their constituents, is thus undermined by ignoring traditional districting principles. *Ibid.*

That the harms she described are not imaginary was demonstrated by the evidence in *Shaw v. Hunt*. According to a survey sponsored by the State of North Carolina in the fall of 1993, Representative Melvin Watt was properly identified as their congressman by only 6% of the voters polled in the "bizarre" twelfth district, but 6% believed their congressman was [Senator] Jesse Helms, 8% believed it was [Ninth

(continued...)

The harmful effects that result from "bizarre" congressional districts which often accompany racial gerrymandering tend to contradict any claim by the State that the creation of these districts reflects a "compelling governmental interest". How can a state believe itself "compelled" to create districts which adversely affect participation by voters in the electoral process and their communication with incumbents and challengers?

The presence of "bizarre" districts will also indicate the absence of "narrow tailoring". However, the importance of "bizarreness" for these purposes does not make it an element of the plaintiffs' claim for relief. The assault on the constitutional principle of equal protection, which results from racial gerrymandering, is still an assault, whether or not it is aggravated by the baneful effects of districts which defy traditional districting principles.

9(...continued)
District] Congressman McMillan, and 14% thought that [Sixth District] Congressman Howard Coble represented them. *See*, Jurisdictional Statement in *Shaw v. Hunt* [94-923] at p. 21. According to a newspaper report on November 9, 1994, confusion still persisted about district boundaries at the time of the last election. *Ibid.*

II. A Racial Gerrymander Is Established When The Plaintiffs Prove That Race Was A Substantial Motivation In The Drawing Of District Lines.

In *Hays* the three-judge district court concluded that the plaintiffs need only establish that race was a substantial factor in drawing the congressional district lines. This conclusion is fully supported by such cases as *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) and *Hunter v. Underwood*, 500 U.S. 352 (1991).

In *Johnson*, the district court apparently applied a more rigorous standard -- that race be the predominant factor. In so doing, the court below gave the defendants an undue advantage -- as this Court should now make clear. However, this error was immaterial, for all the evidence made unmistakably clear that the predominant purpose of the Georgia legislature was to create three majority-black districts in order to satisfy the demands of the Civil Rights Division.

III. Any Registered Voter Has Standing To Attack A Racial Gerrymander.

The complaint in *Shaw* alleged that the State defendants had violated the Fourteenth and Fifteenth Amendments by creating congressional districts which were based on racial classifications. The premise was that such use of race undermined and demeaned the electoral process and thereby injured all registered voters -- including the five white voters who had filed the complaint. The most logical interpretation of the Court's opinion in *Shaw* is that the stigmatic injury resulting from such use of race creates standing for any registered voter. The *Hays* court reached this conclusion. *See* 839 F.Supp. at 1192. Likewise, Judge Phillips found that, as registered voters, the plaintiffs had established their standing in *Shaw v. Hunt,* 861 F.Supp. at 425;[10] and in *Vera*, Judge Jones accepted his analysis. 861 F.Supp. at 1331, n. 38. [11]

Indeed, the objections to standing that have been posed in the present appeals seem to ignore several factors. The rationale for the racial gerrymanders in

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[10] In support of standing, the court relied especially on *Regents of the Univ. of California v. Bakke,* 438 U.S. 265 (1978); *Northern Florida Contractors v. Jacksonville,* 1135 S.Ct. 2297 (1993); and *Heckler v. Matthews*, 465 U.S. 728 (1984).

[11] In the Jurisdictional Statement in *Shaw v. Reno* (No. 92-357), the plaintiff-appellants presented six questions, of which one concerned the standing of white voters to contest the racial gerrymander. When the Court noted probable jurisdiction, it stated a single question to be argued and briefed. In their *amicus* brief, the States of North Carolina and Texas place emphasis on the absence of any reference to standing in the issue stated by the Court. However, in light of the language of the majority opinion in *Shaw* -- which goes beyond the matters specifically raised in the Court's question -- the States reliance seems misplaced.

Louisiana and Georgia -- just as for the racial gerrymander in North Carolina -- was to assure election of black representatives to Congress to represent the interest of the particular state's African-Americans. The African-American members of Congress, selected from the majority-black districts, are given the special role of representing persons of their racial group -- whether or not those persons reside in the districts from which the African-American representatives are elected. As stated in *Shaw*:,

> The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interest of one racial group, elected officials are more likely to believe that their primary obligation is to representing only members of that group rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. at 2827. [12]

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[12] This hypothesis, expressed in *Shaw*, was corroborated by the trial testimony of Congressman Melvin Watt, who represents North Carolina's notorious twelfth district. This testimony "speaks for itself, [*see, e.g., Tr.* pp. 999-1001] representing a district that you are consistent with in your philosophies allows you to be consistent in voting your conscience *without buckling under or catering,* as you said

(continued...)

The inevitable consequence of the racial gerrymander is that white voters in the majority-black districts will often feel themselves unrepresented and that black voters in the other districts will have a similar feeling. Moreover, this system of vicarious representation of racial and ethnic groups is at odds with the seeming purpose of 2 U.S.C. § 2c -- which, in requiring that members of Congress be elected from single-member districts, contemplates that the primary duty of each member will be to provide representation to the voters of his district, rather than to the members of his race. Likewise, it contravenes the intent expressed by the disclaimer of proportional representation in Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. [13]

In some of the briefs submitted by appellants and their allies, it has been suggested that the majority-black districts are more "integrated" than any of the other congressional districts. See, e.g., Amicus Brief of Black

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12(...continued)

my statement said, to other interests that may not predominate in my district [such as the 'business or *white community*'] (emphasis added)". *See* 861 F.Supp. at 478. n.5 (Voorhees, Jr. dissenting).

[13] If proportional representation is to be allowed, this should be done openly by repealing the single-member district requirement in 2 U.S.C. § 2c and allowing states to use race-neutral electoral systems like cumulative voting or single-transferable votes. To try to blend proportional representation by race with a statutory requirement of single-member districts is so irrational as to raise equal protection issues.

Congressional Caucus in *Johnson,* at 20-22. By this it apparently is meant that a substantial percentage of both whites and African-Americans will reside in the same congressional district. However, this "integration" is achieved by "bleaching" the other congressional districts -- reducing their population of African-Americans.

Furthermore, the purported "integration" of the majority-black district is itself a misnomer. Typically, in order to meet the goal of a "safe" district in which an African-American is almost sure to be elected, a number of black urban concentrations of voters are linked together by splitting precincts or census blocks which are predominantly white in population.[14] Although unnecessary to establish standing, the many collateral ill effects of racial gerrymanders reinforce the standing of white voters to obtain judicial relief from this practice.

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[14] North Carolina's two majority-black districts provide the best example of how these "strings of black pearls" may be created with the aid of computer technology. The State contains 229,000 of the approximately 7 million census blocks in the United States; and racial information was available as to each block. Census blocks in which African-Americans resided were linked together by narrow corridors of census blocks in which mostly whites resided. Obviously this technique -- which apparently has also been employed to some extent in Louisiana and Georgia -- discriminates against the white voters because they are more likely than African-Americans to be placed in different congressional districts from the neighbors with whom they share common interests.

IV. Neither Louisiana Nor Georgia Established A Compelling State Interest For Their Racial Gerrymanders.

A. The Burden Of Persuasion Rests On The State As To This Purported Justification.

In *Shaw* the Court observed that the State must have a "strong basis in evidence for [concluding] that remedial action [is] necessary". 113 S.Ct. 2832. Consistent with this comment, the burden of persuasion must rest on the State as to any defense that a racial gerrymander is justified by its "narrow tailoring" to satisfy a "compelling State interest" [15] Indeed, to place the burden of persuasion elsewhere would mock the concept of "strict scrutiny".

B. Compliance With The Unauthorized Demands Of The Civil Rights Division Is Not A Compelling State Interest.

In Louisiana, Georgia, and North Carolina, the State legislatures ultimately bowed to the exercise by the Civil Rights Division of its preclearance power under

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[15] Moreover, a party usually bears the burden of persuasion as to its affirmative allegations and as to issues on which it must produce evidence. See 9 Wigmore, Evidence, § 2486 (Chadbourne Rev. 1981); 2 McCormick, Evidence, § 337 (4th Ed. 1992).

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. That power was being exercised pursuant to the Attorney General's erroneous premise that, under the Voting Rights Act, majority-minority districts must be "maximized". However, as the *Hays* court has emphasized, *see* 839 F.Supp. at 1196-7, n. 21, the Voting Rights Act provides no basis for this policy of maximization; and the disclaimer of proportional representation in Section 2 (the "Dole amendment) indicates a legislative intent to the contrary. *See also*, *Johnson DeGrandy*, 114 S.Ct. 2647 (1994). [16]

Even aside from the obvious abuse of its preclearance authority by the Justice Department, there are several reasons why a state's surrender to that authority does not constitute a "compelling State interest". For one thing, the Attorney General is only empowered to "interpose an objection" -- rather than to make findings of fact. Moreover, no administrative hearing precedes the interposing of an objection; the statute prescribes no standard for the sufficiency of the evidence to justify interposing an objection; and there is no direct judicial review of the Attorney General's action in interposing or withholding an objection. To claim that the results of such an informal and wholly discretionary procedure can have the practical effect of negating the equal protection rights of registered voters seems absurd.

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[16] The overextension of its authority by the Civil Rights Division is also reflected in 28 C.F.R. § 51.55 (b), which empowers the Attorney General to deny preclearance even when she concludes that a "submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2."

The absurdity is compounded by the availability of a judicial remedy under Section 5 itself. If that remedy is utilized, a formal hearing will be conducted and specific findings and conclusions of law will be entered by the three-judge District Court in the District of Columbia. Short of exhausting their judicial remedies, neither Louisiana nor Georgia has a basis for claiming a "compelling State interest" to comply with Section 5.

Admittedly, obtaining judicial relief may cause delay and cost money; however, such delay and expense -- when weighed against the important constitutional rights involved -- are more than tolerable. Moreover, 2 U.S.C. § 2a provides a solution for the short-term problems of delay -- a solution far preferable to that of saddling voters with racially gerrymandered districts until after the next census.

Section 5 specifically provides that neither an objection by the Attorney General, a failure to object, nor a declaratory remedy pursuant to that Section "shall bar a subsequent action to enjoin enforcement of" a redistricting plan. Appellants seek to circumvent that provision by asserting that their desire to comply with

Section 5 is itself a "compelling State interest" which justifies use of the redistricting plan. This evasion should not be tolerated. [17]

C. Louisiana And Georgia Failed To Demonstrate A Compelling State Interest In Compliance With Section 2 Of The Voting Rights Act.

In *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), this Court announced three requirements for requiring the creation of single-member districts in order to comply with Section 2 of the Voting Rights Act. One of these conditions was "geographical compactness". In *Growe v. Emison*, 113 S.Ct. 1075 (1993), the Court applied the *Gingles* conditions to congressional districts.

When the location of the African-American population in Louisiana and Georgia is considered, it appears that, under *Gingles* and *Growe,* Section 2 would not require Louisiana to have more than one majority-black congressional district and Georgia to have more than two. However, pursuant to its misguided and illegal policy of maximization of these districts, the Civil Rights Division was insisting on two majority-minority districts for Louisiana and three for Georgia. The capitulation of these two states to this insistence is now being justified as a "compelling State interest" -- apparently on the theory that someone might have successfully sued the states for their failure to "maximize".

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[17] In their *amicus* brief the States of Texas and North Carolina argue that the recognition of this purported "compelling governmental interest" will help preserve for states a necessary freedom from federal control -- apparently a reference to control by the Federal courts. In the case of North Carolina, at least, it seems odd that the State should be relying in its defense on the State's acquiescence in the unreasonable position of the Department of Justice lawyers, with whom the General Assembly unsuccessfully struggled for months to obtain preclearance of the State's first redistricting plan. North Carolina, should be welcoming judicial intervention now to allow it to use a plan more similar to the one it initially wished to use.

In view of the lack of "geographic compactness", these purported concerns seem "pretextual" -- to use a favorite term of the Civil Rights Division.[18] However, appellants and their allies would respond that "compactness" is a very relative concept and that Louisiana and Georgia might have more at risk than at first would appear. This argument is overstated. Apparently the Court believed that "geographic compactness" had a clear meaning when it announced the *Gingles* conditions. The term "compactness" has also been used by Justices of this Court on another occasion; [19] and presumably they also believed that the term was clear. Moreover, at various times "compactness" has been used in federal and state statutes concerning redistricting and reapportionment.

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[18] Apparently the State of Georgia itself is not asserting this defense of a "compelling governmental interest" in compliance with Section 2; byt the other appellants explain that this omission is due to other litigation in which Georgia is involved and, therefore, should be disregarded. However, it does seem somewhat odd that Georgia is vigorously disputing allegations of Section 2 violations in other cases, but here is relying on the threat of possible lawsuits against it to justify its infringement on the equal protection rights of its voters by reason of its racial gerrymander.

In short, one must conclude that the alleged uncertainty of "traditional districting principles" and of concepts like "compactness" is much less than appellants would like this Court to believe. As a corollary, it seems clear that the racial gerrymanders in Louisiana and Georgia were not the result of a desire to comply with Section 2 or of the belief that Section 2 dictated the creation of the additional majority-black districts on which the Civil Rights Division insisted. Thus, Section 2 does not give rise to a "compelling State inteest" as contended by appellants.

V. Neither Louisiana Nor Georgia "Narrowly Tailored" Their Redistricting Plans.

As has been previously noted, Louisiana and Georgia have the burden of persuading the factfinder that their plans were "narrowly tailored". At the very least, this would require a showing that there was a consideration of other alternatives to the creation of majority-black districts.[20] Furthermore, if these States were to create majority-minority districts, narrow tailoring would require that, to the greatest extent possible, these districts be drawn pursuant to "traditional districting principles". There is little indication that any effort was made along these lines; and certainly there is no showing that some of the majority-minority districts could not have been made more compact. Certainly if a state seeks to defend its racial gerrymandering on the ground of "narrow tailoring" to meet a "compelling State interest" it should be required to show that it exerted its best effort to minimize the disruption that resulted from its purported need to meet its "compelling State interest". Neither Louisiana nor Georgia have made any such showing.

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[19] *See, United Jewish Organizations v. Carey*, 430 U.S. 144, 168 (1977) ("employing sound districting principles, such as *compactness* and population equality") (emphasis supplied). *See also, Drum v. Seawell,* 249 F.Supp. 988 (M.D.N.C) (1966) (three-judge court) (requiring "compactness" and "contiguousness" in a congressional redistricting plan)..

In *Shaw v. Hunt* the majority, over Judge Voorhees' strong objection, seemed to take the position that if it were necessary to create a majority-minority district, then the Court should not review how that district was drawn. In *Vera*, Judge Edith Jones cogently takes issue with this approach, 861 F.Supp at 1343-44, n.55. As she points out, in *Shaw* the Court observed that the deliberate creation of majority-minority districts to remedy past discrimination was only constitutionally permissible beyond the framework of the Voting Rights Act if the State employed sound districting principles and if the racial groups' residential patterns permitted the creation of districts, *see* 113 S. Ct. at 2832. Her logic is persuasive that "these statements bear importantly on the 'fit' between the state's compelling interest in addressing Voting Rights concerns and the form of the districts that must be narrowly tailored to suit them". *Ibid.* Under Judge Jones' rationale -- which conforms to the plain meaning of "narrow tailoring" -- "a racially constructed district must satisfy other neutral districting criteria". *Ibid.* [21] Neither Louisiana nor Georgia have made any such showing.

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[20] One such alternative might be to provide that a second primary would not be necessary if the leader in the first primary received more than a prescribed percentage of the votes cast. *Cf.* N.C.G.S. § 163-111. Also, if there were no restrictions on voting in a party primary by voters not registered as members of that party, imposition of such a restriction might be considered. Apparently measures of this type were not considered as a possible way to meet whatever State interest was believed to require the creation of majority-black districts.

The rationale of "narrow tailoring" would also seem to require that there be some nexus between the placement of majority-black districts and the past discrimination which is supposed to justify the remedial action.[22] In *Dolan v. City of Tigard,* 114 S.Ct. 2309 (1994), the Court held that when property is taken for a public purpose due process requires "essential nexus", "rough proportionality", and "individualized determination". In the context of equal protection, "narrow tailoring" would seem to demand a somewhat similar showing -- especially that an "individualized determination" was made as to whether a majority-minority district was necessary, what percentage of minority persons was necessary to achieve the required result, and where the boundaries of the district could be located with minimum disruption to voter participation and competition in the political process. Neither Louisiana nor Georgia came anywhere near meeting such requirements.

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[21] The importance for constitutional purposes of having legislative districts which have rational boundaries seems to have been assumed by the Court in *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

CONCLUSION

When all is said and done, the basic argument which appellants and their allies advance in support of the majority-black districts in Louisiana and Georgia is that, after Reconstruction, African-Americans were not elected to Congress from Southern states and it is necessary now to make up for past sins. However appealing this argument may seem at first glance, it has many defects.

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[22] Such a nexus was notably absent in North Carolina's congressional redistricting plan, for there was little effort -- especially with the snakelike Twelfth District -- to relate the district boundaries to the counties which were subject to preclelarance because of past discrimination. Indeed, in the Twelfth District the percentage of registered black voters was higher than the percentage of white voters. *See* Jurisdictional Statement in *Shaw v. Hunt*, No. 94-923 at 24.

For one thing, the cure may be as bad as the disease; the majority-minority districts tend to breed resentment on the part of whites and thereby increase the racial polarization they are intended to reduce. Moreover, they reduce the incentive to form multi-racial coalitions of voters. Even more important, however, their creation signifies a retreat from the ideal of a color-blind society and a new emphasis on "descriptive representation", rather than "substantive representation".[23]

Secondly, the majority-minority districts are premised on racial stereotypes; and these stereotypes are becoming increasingly inaccurate. Thus, the black community is no longer as monolithic as it may have seemed at one time. White voters seem to have recognized this fact and have been willing to consider black candidates in terms of their individual views -- rather than in terms of stereotypes. Significantly, two blacks -- J.C. Watts and Gary Franks have been elected to Congress in the recent past from overwhelmingly white congressional districts; but, unlike the African-Americans

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23 In her recent book about the representation of black interests in Congress, Carol Swain, an African-American political scientists, makes the important distinction between "descriptive representation:" of black voters -- their representation by black officeholders -- and "substantive representation" -- their representation by persons of whatever race who advance the interests of black voters. *See*, Swain, BLACK FACES, BLACK INTERESTS, P. 5 (1993).

elected from majority-minority districts, these representatives are Republicans.[24]

Furthermore, the absence of black officeholders in past years may be somewhat misleading. In this connection a comparison is in order. Women in the United States did not have a constitutional right to vote until the Nineteenth Amendment was ratified in 1920. Since then the candidacy of women for political office has increased significantly, but there are still relatively few women in the Congress. However, an extensive survey recently released by the National Women's Political Caucus shows that when women have run for public office, they have been successful to the same extent as men. Similarly, the significantly lower percentage of black elected officials than white may not be attributable solely to race but also to many other factors -- such as fewer candidates, less financial support, and the well-entrenched position of some white incumbents.

Whatever the cause may be, the use of majority-minority districts to increase the number of African-Americans in the Congress should be approached cautiously and every effort must be made to find other alternatives. Clearly neither Louisiana nor Georgia made such a search for alternatives; and even though this failure may have been in part attributable to the coercive and misguided tactics of the Civil Rights Division, that is not an adequate excuse for depriving the Plaintiff-Appellees of their equal protection right to vote in congressional districts whose boundaries are nowdrawn on the basis of racial classifications. In both *Hays* and *Johnson*, the judgments of the Court below should be affirmed.

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[24] The increased openness of the American electoral process is also evidenced by the fact that currently a Native-American serves in the Senate from Colorado and that some years ago a Japanese-American was elected to the Senate from California -- the State where Japanese-Americans were interned during World War II. *See Korematsu v. United States, supra.*

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